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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 424

EDWARD E. JENKINS,

Receiver of The National City Bank of Salt Lake City, Utah, et al.,

Petitioners.

vs.

NATIONAL SURETY COMPANY OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

PREFACE.

The sole question upon which the jurisdiction of the District Court of the United States in and for the District of Utah was invoked, was diversity of citizenship. No federal question was involved in the controversy. The decree of the Circuit Court of Appeals of the Eighth Circuit is therefore final, and petitioners, as a matter of right, can have no standing in this Court. The only avenue of approach to this Court is by an appeal to its discretion by the

writ applied for. This Court has many times declared that this power "will be sparingly exercised", (Lau Ou Beu, 35 L. Ed. 868, 141 U. S. 583), "only in cases of peculiar gravity and general importance", (American Const. Company v. Jacksonville R. Company, 37 L. Ed. 484, 148 U. S. 372), "in some matter affecting the nation in its internal or external relations," (Forsyth v. Hammond, 41 L. Ed. 1095, 166 U. S. 506). An examination of the cases cited by petitioners will disclose that "there is no real and embarrassing conflict of authority between the Circuit Courts of Appeal." (Layne and Bowler, Corp. v. Western Well Works, 67 L. Ed. 712, 261 U. S. 387).

The case at bar involves no question of jurisdiction, nor is it an "extraordinary case," or "a grave question of vital importance to the public;" but is merely a case of importance to the litigants here involved. It is "not such a case as falls within the category of questions of such gravity and general importance as to require its review" by this Court. (Ex-parte Woods, 36 L. Ed. 125, 143 U. S. 215), and the grounds alleged are insufficient to call for the interposition of this Honorable Court. As was stated by this Court in the case of Magnum Import Company v. D. E. Spoturno, (67 L. Ed. 922, 260 U. S. 159), "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Petitioners in their application set forth twelve grounds alleged to justify the issuance of the writ. Many of these grounds, however, are merely re-statements of other grounds asserted. However, petitioners have set forth practically every ground ever assigned by this Court for the issuance of such writ, even to the extent of contending that the decision "involves a ruling upon important questions of general law that is untenable and contrary to the great weight of authority." The brief is largely an extensive reargument of all phases of the case presented to the Circuit Court of Appeals. Because of the numerous and varied grounds asserted for the issuance of the writ, involving consideration of questions of fact, of local statutes, and the failure of petitioners to distinguish between subrogation and reimbursement and the authorities and principles applicable to each, and because petitioners, in their application and brief rely upon their own conclusions rather than upon facts, the work of respondent in replying thereto, and the length of this reply brief have been multiplied to an extent altogether unjustified, except for the reasons assigned.

II.

STATEMENT OF THE CASE.

Briefly, the complaint herein alleges, and it is admitted by all the parties herein, that on the third day of January, 1921, the respondent National Surety Company, upon the request and application of the National City Bank, executed and delivered to Edward J. Groesbeck as county treasurer of Salt Lake County, its certain bond in the sum of $125,000.000, guaranteeing the repayment of such sums as said treasurer might deposit in said bank, up to the amount of $125,000.00; that as an inducement and consideration for the execution of said bond, the Bank made, executed and delivered to the respondent a certain Indemnity Agreement set forth in said complaint, wherein and whereby it agreed to indemnify the respondent and save it harmless from all claims and demands whatsoever on account of its execution of the said bond, and to pay over, reimburse and make good to the respondent all sums of money which it might be obliged to pay by reason of having executed said bond; and in said Indemnity Agreement the respondent was given the right to look to and rely upon the property of the bank and its income and earnings, and to follow and recover out of the bank's property then belonging to it or which might thereafter belong to it and the income and earnings thereof, for anything that might become due to the respondent under said Indemnity Agreement. Respondent further alleges that on the 17th day of January, 1922, the said National City Bank failed and this respondent was obliged to and did on June 17, 1922, pay to Salt Lake County and Edward J. Groesbeck, its treasurer, the sum of $125,000.00, and that by reason thereof the receiver is indebted to the said respondent in the sum of $120,000.00 ($5,000.00 of its claim having been assigned to the American Indemnity Company). Said complaint concludes with a prayer that its claim based upon said written Indemnity Agreement and filed with defendant receiver of said bank, in said amount, be allowed and approved and that dividends be paid to it upon the same basis as paid to other claimants in the list of common claims against said bank. (R. 1-6).

A true copy of said Indemnity Agreement referred to in said complaint is attached to and made a part of plaintiff's complaint, (R. 6-11), as is also the said bond executed by the plaintiff in behalf of said National City Bank (R. 12),

and the said claim filed with the said Receiver based upon said Indemnity Agreement (R. 13-17).

All of the foregoing allegations of the respondent's complaint were either admitted in the respective answers of the petitioners or upon the trial of the case, and therefore are not in dispute.

While the record herein is voluminous, the testimony offered by the respondent National Surety Company in support of its complaint, (R. 1-17), is very short, and appears at Pages 56-66 of the record. Respondent alleged in its complaint that the said bond was given *pursuant to Section 4500* of the Comp. Laws of Utah, 1917, and that the Treasurer deposited the funds in the bank as such (R.2), and also that the respondent, on June 17, 1922, paid the penalty of its bond in the sum of $125,000.00, and that it has not been repaid any part thereof. (R. 65). The foregoing made a prima facie case for the respondent, and most of the remainder of the record herein is devoted to the efforts of the petitioners to show that the cause of action herein sued upon was res judicata. In support of this contention, petitioners introduced in evidence the pleadings and decree in the other case, and extracts from the record and briefs in that case. The respondent in turn offered extracts from the record and briefs of the petitioners in said action.

Section 1492 of the Comp. Laws of Utah, 1917, provides that the County Treasurer must safely keep all money belonging to the state, or any city or county of the state, until disbursed according to law; that he shall not lend the same; and that he shall be liable therefor on his official bond. The treasurer is expressly forbidden by law to pay out any portion thereof for any purpose, unless authorized by law. The deposit was in the name of the county and in order to draw against it the treasurer was obliged by law and by the bank as well, to have the counter-signature of the County Auditor. (R. 157).

The deposit of said public funds in said bank by said treasurer was made pursuant to Section 4500 of the Compiled Laws of Utah, 1917, which reads as follows:

> "Any public officer having public funds in his custody may deposit the same, or any part thereof, with any bank incorporated under the national banking act and doing business in this state, or with any bank or trust company incorporated under the laws

> of and engaged in business in this state; *provided*, that he requires such depository to pay interest on all funds so deposited at the rate of not less than 2 per cent per annum, and that he take from such depository collateral security or a good and sufficient surety company bond or a personal bond approved by him and sufficient in amount to fully protect such funds. * * * "

Although a consideration of the instant case, of necessity, involves a consideration of the state laws under which the deposit was made, such laws are not mentioned or referred to in petitioners' application or brief. Pursuant to said Section 4500 the respondent, in consideration of the Indemnity Agreement herein sued upon, executed and delivered to Groesbeck as county treasurer, its bond in the sum of $125,000.00, (R. 56-65), and the bank also gave as security for the deposit, the bond of the Fidelity & Deposit Company in the sum of $75,000.00, the bond of the Massachusetts Company in the sum of $25,000.00, and collateral consisting of $360,000.00, par value of bonds of the Crystal Lake Farms Company.

Early in the receivership and prior to any litigation, respondent filed its claim with the receiver, claiming the equitable right of subrogation or substitution, to the dividends to be paid by the receiver upon said deposit, (R. 104). Respondent's claim of subrogation to the dividends to be paid upon the public deposit was denied in said case, and said decree was affirmed by the Circuit Court of Appeals, (National Surety Company vs. Salt Lake County, 5 Fed. [2d] 34), (R. 110). Thereafter, this respondent did not as stated by petitioners, refile the same claim relied upon and made to the bank for its claim to subrogation, but filed with the receiver an entirely new and different claim based upon its own rights under its Indemnity Agreement, and its right to reimbursement. This claim was the foundation of the present suit. (R. 162).

Thereafter, respondent National Surety Company brought the present action as plaintiff, directly against the receiver, upon the contract of indemnity executed by the bank. (R. 1-11). At the request of the receiver, the American and Groesbeck were interpleaded as parties defendant. (R. 29). The defendants pleaded res judicata by reason of the decree in the other action. The trial Court allowed the claim of the National herein sued upon, but decreed that it should receive no dividends thereon. (R. 51).

The respondent National Surety Company appealed from said decree to the Circuit Court of Appeals of the Eighth Circuit, and the same was reversed on March 28, 1927, by a unanimous decision of that Court. (18 Fed. [2d] 707. R. 232). Thereafter, on May 27, 1927, the petitioners herein filed a lengthy and extensive brief for a rehearing, which rehearing was denied by that Court on June 14, 1927. The facts and the situation of the parties in the other action are fully set forth in the opinion of the Circuit Court of Appeals herein and will be further referred to in our discussion of the question of res judicata.

III.

THE QUESTION IN THE COURT BELOW.

The essential questions for determination by the Court were: first, whether the present action is res judicata by reason of the decision of the same Court (Eighth Circuit Court of Appeals) in the case hereinbefore referred to of National Surety Company vs. Salt Lake County, 5 Fed. (2d) 34; and second, the enforcibility of a contract of indemnity. The Court determined that its decision in the action above referred to was not res judicata of the issue here involved, and that, therefore, respondent was a creditor of the bank by reason of its Indemnity Agreement and was entitled to the allowance of its claim against the bank as a separate and independent matter apart from subrogation, and to the payment of dividends thereon. The Trial Court held that respondent was such a creditor and allowed its claim against the receiver, and the Circuit Court of Appeals held that as such a creditor it was upon the same basis as all other creditors of the bank and entitled to the payment of dividends upon its claim pro rata with other creditors. Petitioners cited to the Circuit Court of Appeals, as they have here, cases involving the doctrine of subrogation, to the effect that subrogation will not be permitted in favor of a surety until the obligee has been paid in full, and such cases were properly held by that Court to have no application to the instant case.

Petitioner American Surety Company stated in its brief in the Circuit Court of Appeals, "No one questions the sufficiency of the consideration for the Indemnity Agreement from the bank to the National, or that the obligation of the bank to indemnify the surety springs up at the time the relation is entered into and is consummated when the surety

has paid the debt." Petitioners now contend at Page 65 of their brief herein, "Only by the erroneous application of the doctrine of relation back could the Court reach its conclusion in the Centropolis Bank case. * * * The National was not a creditor of the bank at the date of the declaration of insolvency."

IV.

RES JUDICATA.

Petitioners contend herein that the Circuit Court of Appeals erred in holding that the case of American Surety Company, et al. v. Jenkins, Receiver, 5 Fed. (2d) 34, (R—110), was not res judicata of the question here involved. In order to determine whether said action was res judicata as to the claim of the respondent asserted in the present suit for reimbursement from the assets in the hands of the defendant Receiver belonging to the said bank, it was necessary for the Circuit Court of Appeals to examine and determine said question from the pleadings, the facts, the theory upon which said case was tried, the decree, and the proceedings and record on appeal therein.

Said action was brought for the purpose of recovering a dividend of ten per cent upon the amount of said deposit, to-wit, $56,809.42, of which amount it was alleged by said plaintiffs, $47,666.01 was necessary to be paid to Salt Lake County to make it whole on account of the deposit of public moneys in said National City Bank. Salt Lake County was therefore interested only in that portion of the said dividend. *The said dividend then in the Receiver's hands and the dividends to be thereafter paid by him upon the said deposit of public moneys was the subject matter of said action, to which further dividends accruing in the hands of said receiver upon said deposit, the American Surety Company claimed in said complaint to be entitled, by reason of subrogation to the rights of Salt Lake County and Treasurer Groesbeck.* Said complaint concludes with a prayer that $47,666.01 of said dividend then in the hands of the receiver be paid to Salt Lake County, and that the balance of said dividend and "all further dividends accruing in the hands of the defendant by reason of the deposit of County funds in said bank, be paid over to said American Surety Company of New York." (R—77).

It is therefore apparent that the subject matter of said action was the *special fund* arising from dividends accrued

and and to accrue upon *said deposit*, and from the sale or other disposition of the bonds of the Crystal Lake Farms Company.

The receiver, in his answer to the complaint in said action, alleged that the respondent herein claimed the right to be *subrogated* to the rights of the county and said treasurer in and to said dividends upon said deposit to the amount of its loss in the sum of $125,000.00, and that it had filed its claim to subrogation in said amount, (R—83), and the receiver concluded his answer with a prayer that the Court make its order requiring the respondent herein to appear in said action and *set forth its rights to said dividend then on hand and to such further dividends as might accrue in his hands upon said deposit.* (R—85).

Pursuant to said order of interpleader, the respondent herein filed in said action its answer, claiming subrogation to said dividend together with dividends to be thereafter declared by said receiver upon said deposit, alleging that its right of subrogation to dividends upon said deposit was prior in time and right to that of the American Surety Company, because of the failure of the principal of the latter, to-wit, Treasurer Groesbeck, to comply with the law by not taking from said bank sufficient depository protection to fully protect the public funds so deposited by him. As the Circuit Court held, "The order of Interpleader brought the National in *solely* for the purpose of determining whether it or the American had the prior right of *subrogation* to those specific funds and bonds." (R. 236).

The Petitioners in the present action claimed that Respondent was estopped from bringing this action upon said Indemnity Agreement, notwithstanding the fact, as clearly appears from the record in said action, that *no issue was joined or tried between this respondent and said defendant receiver upon the rights of respondent to have its claim against the said receiver arising out of said Indemnity Agreement, for reimbursement out of the general assets of said bank, allowed and approved, and the receiver directed to pay dividends thereon, as a separate claim and demand.* No claim was made or asserted at the trial of said action by the Respondent for a *separate judgment* against said receiver arising out of said Indemnity Agreement, and the action at the outset resolved itself into a contest between the respective surety companies as to their *respective rights to priority in and to said dividends upon said deposit. The*

receiver filed no reply whatsoever to the said answer of the respondent in said action.

The facts and issues in said action appear fully in the decree of the United States Circuit Court of Appeals in said action, (R—110), and for the sake of brevity, we will merely call attention to that decree in order that the Court may see the facts and issues involved in said case.

All of the parties agreed at the outset of said trial in said other action that Salt Lake County should be paid out of said dividend of $56,809.42 the sum of $47,666.01. Judge Armstrong, representing the county, stated to the Court that it was his understanding that inasmuch as it was agreed by all parties that the county should be first made whole, "that the case will then resolve itself into a contest between the surety companies that are interested here." (R—68).

Salt Lake County was thereupon, in effect, dismissed from the proceeding. (R—70).

The Court thereupon asked the question:

> "What is the fund that the receiver has; how much is left?"

To which Mr. Ray, representing the receiver, replied:

> "$9,143.00." (R—173).

Mr. Jensen, attorney for the American Surety Company, then stated to the Court that the question before it was "the question of the right between the surety companies to the balance of any dividends which may be paid, so we desire all of the surety companies to have an adjudication of their rights with respect *to that fund.*" (R—173).

Mr. Jensen then further stated to the Court:

> "This litigation as it now stands is purely litigation between the official bondsmen, the American Surety Company on the one side and the Massachusetts Bonding Company and the National Surety Company on the other side." (R—174).

Thereupon the Court stated:

> "It is a contest between these bond companies as to priority?"

To this Mr. Jensen replied: "That is the case, your Honor." (R—174).

Said action was thereupon tried and argued to the Court pursuant to the statements made by the respective parties and by the Court, that the action was purely a contest between the surety companies as to their respective rights to *priority to subrogation in the payment of dividends by said receiver upon said deposit*. The Court in said action, and all the parties to said action, recognized the fact that the said action was in fact one concerning only the disposition of the dividends in the receiver's hands and dividends thereafter to accrue in his hands on said deposit, and no claim of any kind whatsoever was made or asserted by this Respondent at said trial against said defendant receiver upon said Indemnity Agreement herein sued upon. However, as bearing upon the equitable rights of the parties and in support of the principle contended for by this Respondent, that a legal title added to an equitable title will prevail over a purely equitable title, it offered in evidence said Indemnity Agreement, as a collateral and incidental matter bearing upon its equitable right to subrogation to said dividends. As a matter of fact, the attorney for the American Surety Company and Treasurer Groesbeck, objected to the receipt in evidence of said Indemnity Agreement upon the theory that it was immaterial and irrelevant to the issues in said case, (R. 117), and we admit that such objection would have been well taken had said Indemnity Agreement been offered for the purpose of establishing a separate and independent claim directly against the receiver for reimbursement out of the general assets of the bank instead of being offered as it was, as collaterally and incidentally bearing upon respondent's right to subrogation. As the Circuit Court of Appeals held herein, "While the Indemnity Agreement of the National Company was pleaded and introduced in evidence, it was upon the theory that it gave a superior equity to the National Company, and because thereof, a prior right to subrogation." (R. 236).

At the conclusion of the evidence, *the sole issue* involved in said case, to-wit, the respective rights of the surety companies to priority to subrogation to said dividends upon said deposit and said Crystal Lake Farm Company bonds, was argued by respective counsel for the Surety Companies, and the cause was thereupon submitted to the Court upon said issue. As the Circuit Court of Appeals held herein, "That was the sole issue tried by the Court and determined and adjudicated by its decree." (R. 235).

The trial Court, at the conclusion of the case, made and entered its order therein for a decree in favor of the American Surety Company to the effect that it was entitled to priority to subrogation in and to the special fund arising from the dividends then in the hands of the said receiver and thereafter to accrue in his hands, and from the sale or other disposition of the Crystal Lake Farm Company bonds.

Said decree, in paragraph C thereof, (R—108), provides as follows:

> "The plaintiff American Surety Company of New York be and it is *subrogated* to and entitled to succeed to the rights of the said Edward J. Groesbeck as treasurer of Salt Lake County and of Salt Lake County, *to all dividends* that may become *payable on the claim in the sum of $568,094.29* of said Edward J. Groesbeck as treasurer of Salt Lake County against said National City Bank, and is subrogated to and entitled to succeed to the rights of said Edward J. Groesbeck as treasurer of Salt Lake County and of Salt Lake County, in the bonds of the Crystal Lake Lands Company of the par value of $360,000.00."

It is apparent from an examination of said decree that the only matter determined or decided in said case was the respective claims of the surety companies to priority to subrogation in and to the fund arising from the said dividends and the sale or other disposition of the said bonds of the Crystal Lake Farm Lands Company of the par value of $360,000.00. Nothing whatever in said decree refers to Petitioners' right to indemnity directly against the bank, and consideration thereof was expressly excluded by reason of the oral stipulations of the parties, hereinbefore referred to upon the trial of said action. The subject matter of said action was the dividends upon the said deposit and the Crystal Lake bonds, and the question therein determined, was the right of the respective surety companies to succeed thereto by subrogation.

It is equally clear from an examination of the opinion of the United States Circuit Court of Appeals affirming said decree of the trial Court, that the *only question in issue, involved or determined in said action was the respective rights of the surety companies to priority by subrogation to the funds to be created from said dividends upon said deposit and the sale or other disposition of said Crystal Lake Farm Company bonds.* (R. 112).

The Circuit Court of Appeals, in its opinion in said action, 5 Fed. (2d) 34, (R. 110), clearly defined the issue involved therein as follows:

> "These cases involve the question of appellants' right *to share by way of subrogation* in certain dividends in the hands of one Jenkins and accruing from assets which came into the hands of Jenkins as Receiver of the National City Bank of Salt Lake City, Utah, which failed on the 17th day of January, 1922, as also the right of appellants *to participate in the proceeds of certain securities* in the hands of one Groesbeck.
>
> "The single question is, whether, upon the facts stated, the law and the equities give these remaining dividends and the proceeds of the Crystal Lake Farm bonds, after the County has been paid in full, to the appellant National Surety Company or the appellee American Surety Company. * * *
>
> "The rule applicable to this situation seems to be fairly well settled. The rule is that 'the right of *Subrogation* cannot be enforced until the whole debt is paid.' * * *
>
> "The rule deducible from the cases is that till the creditor is paid in full, no right of subrogation exists in favor of sureties who pay a part of the debt."

The National designated and offered in evidence certain portions of the brief of the American on appeal to the Circuit Court of Appeals in said case, (R—191-195). Space will not permit us to repeat here the portions of the said brief referred to, but we most respectfully call the same to the attention of the Court.

We desire to call attention specifically to the following extracts from this brief of the American Surety Company, as appearing in the record at the pages referred to:

> "The National Surety Company now claims right of subrogation as to future dividends on E. J. Groesbeck's deposit and as to the Crystal Lake bonds, prior to the American Surety Company of New York." (R—191).
>
> "The primary questions in this case are, therefore, First. Now that Salt Lake County has been

paid in full, which Surety Company is entitled to priority as to dividends from the receiver, on E. J. Groesbeck's unpaid deposit, as County Treasurer, with the bank? Second. What are the rights of the two Surety Companies with respect to the $360,000.-00 par value Crystal Lake bonds taken by E. J. Groesbeck as aforesaid and subsequently assigned to The American Surety Company of New York?" (R. 191).

"Appellants' counsel reminds us that as an additional contractual fact the National Surety Company had an *agreement for indemnity* with the National City Bank (Appellants' Brief 18 to 23 and Tr. 87). *We deem this agreement wholly immaterial to the issues of this case, but we refer to it here to get before the court all the alleged contractual relationships of the parties.*" (R—192).

"As we understand them, the contentions of the National Surety Company are substantially as follows:

"That the indemnity agreement of the bank, embodied in the bank's application to the National Surety Company for depository bond, gives the national Surety Company a direct legal right, not to indemnity out of the general assets of the bank as such, but to indemnity out of the dividends declared and payable upon the claim of Mr. Groesbeck. * * * "

"*It is very clear from the foregoing case, and clear upon principle, that the indemnity agreement between the Bank and the National must be treated as a separate contractual agreement affecting only the National and the Bank. Whether it constitutes a sufficient basis for some direct claim against the Bank, is interestingly discussed by the dissenting opinion in the foregoing case of U. S. F. & G. Co. vs. Carnegie Trust Company.* (R. 192).

"We submit that both upon principle, as a plain matter of contract, and upon the authority of the case above mentioned, there is nothing in the National's so-called indemnity agreement with the Bank that gives it any standing or any rights *in the present litigation.*" (R. 193).

> "It follows, therefore, that the National, neither through its creditor, the Treasurer, nor through its principal, the Bank, has acquired any rights, and that under neither rule is it entitled to subrogation. The National is claiming rights of subrogation under facts and circumstances where no such rights can arise." (R. 193).

It should not be overlooked that the petitioners have offered in their brief and can offer, no explanation of these statements made by them in said other action. However, petitioners now contend in their brief in this Court at the bottom of Page 74 thereof, "It was necessary to determine the rights of the National under its indemnity agreement in order to make the adjudication of all the issues involved in the former suit."

It is apparent from the excerpts from the brief of the American in said action that the only question that was involved in said action was the said right to subrogation, and that in reply to what was said in the brief of the respondent in said Circuit Court of Appeals with reference to said Indemnity Agreement, that the American contended that such an agreement was not involved in said case, and that if such right did exist, it would be the subject of a direct claim against the bank and an independent suit thereon. Apparently the trial Court agreed with such contention, for nowhere in the decree of the Trial Court nor in the opinion of the Circuit Court of Appeals is said Indemnity Agreement mentioned. *The Court agreed with counsel for the American that the rights acquired by this respondent under said Indemnity Agreement were the subject of an independent suit against the receiver of said bank, based solely upon the rights acquired thereunder. The petitioners herein, having made such contention with respect to the Indemnity Agreement herein sued upon, are estopped from now claiming that the question of the right of this Respondent to recover against said bank upon said Indemnity Agreement, as a separate and independent matter apart from subrogation, was decided and adjudicated in said other action.* In other words, they would now contend that a matter which they contended was immaterial to the issue in the former case and with which contention the Court agreed and therefore did not decide, is now res judicata in this action. It is inconceivable that such is the law, and that these Petitioners may blow both hot and cold.

The decree in said action is based, as clearly appears from an examination thereof, as well as from the opinion of the Circuit Court of Appeals, upon the equities of the American Surety Company and the National Surety Company, *only upon their respective rights of subrogation to the funds arising from dividends upon said deposit and the sale or other disposition of said Crystal Lake bonds.* As the Circuit Court of Appeals held in its decision herein:

> "It is clear that the parties, the trial court, and the appellate court, were of the opinion in the former suit that the National Company's direct claim against the bank on its contract of indemnity and the right to dividends thereon were not there involved. The prior right of subrogation to the dividends on the claim of the county and to the proceeds of the Crystal Lake bonds was the sole issue litigated, the sole question determined by the decree, and the sole question passed upon by this court on appeal. The right of the National Company, because of its contract of indemnity, to participate in the dividends payable on the deposit of Groesbeck as Treasurer was denied, but the right of the National Company to participate in dividends as a general creditor upon the contract of indemnity was neither considered nor determined.
>
> "The cause of action asserted by the National Company in the former suit was predicated upon its alleged right of subrogation. The cause of action sought to be enforced by the National Company in this case is predicated upon its contract of indemnity. It is a cause of action which is wholly independent of, and entirely separate and distinct from, the alleged cause of action asserted by the National Company in the former suit. Since the National Company seeks relief in the instant case upon a *different and distinct cause of action* from the one asserted by it in the former suit, the judgment in the former suit is conclusive only as to such points or questions as were actually in issue and adjudicated therein." (R. 237).

Petitioners complain that in the Centropolis case the Court "did not hold that the Indemnity Agreement was not a proper subject of litigation," but that in the instant case the Court held that the Indemnity Agreement "was

not a proper subject for litigation in the former suit." In the Centropolis Bank case the surety company was the plaintiff and brought its action directly against the receiver of the bank upon its Indemnity Agreement, just as in the case at bar, while in the former suit, this Petitioner was interpleaded as a party defendant in an action brought by the American Surety Company against the receiver to obtain subrogation to the rights of the county in and to the dividends to be paid by the receiver upon the public deposit, and by said order of interpleader, this Petitioner was required to set forth its claim by subrogation in and to the specific funds which were the subject matter of said suit, to-wit, the dividends upon said deposit. The former action was, as stated many times by the American, merely a contest between the surety companies as to their rights of subrogation in and to said dividends.

The receiver and this Petitioner were not adversary parties in the other action, no issue was joined between them. In the case of Central Banking & Securities Company vs. United States Fidelity & Guaranty Company, 80 S. E. 121, the Court said:

> "It is the general rule that parties to a judgment are not bound by it in a subsequent controversy between each other unless they were adversary parties in the original action."

V.

AUTHORITIES ON RES JUDICATA.

Petitioners assert that the decision herein is in conflict with the decisions of other Federal Courts with respect to the question of res judicata. If we simply assume as petitioners do, that the same cause of action is here involved as was in the other action, then, of course, the cases cited by petitioners are applicable. However, in view of the findings made by the Circuit Court of Appeals in this case with respect to the facts, issues and decrees in the two actions, the theory upon which each case was tried, the subject matter of each of the said actions, the manner in which the parties came before the Court, and the purposes of each of the two actions, and the citation of the authorities applicable to the situation, where the causes of action are separate and distinct, as set forth in the very able opinion of the Circuit Court of Appeals herein, it seems wholly unnecessary to

take the time to further discuss this feature of the case. We regard the record as above set forth and the able opinion of the Court as conclusive of this matter. We might repeat here our argument and the authorities cited by us in this case before the Circuit Court, but no justification for so doing occurs to us. The decision of the Circuit Court herein so clearly disposes of every contention made by the Petitioners and applies the law with such accuracy and understanding, that it seems to us incomprehensible that the petitioners should still persist to argue this question.

VI.

CASES ALLEGED TO BE IN CONFLICT.

Petitioners state that the decree herein "is squarely in conflict" with the decision of this Court in the case of United States Fidelity & Guaranty Company versus Wooldridge, 268 U. S. 234, 69 L. Ed. 932, and the decision of the Sixth Circuit Court of Appeals in the case of Springfield National Bank versus American Surety Company, 7 Fed. (2d) 44, and the decision of the Ninth Circuit Court of Appeals in the case of Fidelity & Deposit Company versus Robinson, 7 Fed. (2d) 571.

It is apparent from an examination of the latter two cases that the decision in each of them is based upon the decision of this Court in the Wooldridge case, supra. An examination of these three cases will disclose that they are not at all similar to the case at bar, that they involve merely the question of a set-off, and that the question here involved, to-wit, the surety's rights to recovery directly from its principal upon its indemnity agreement, was not at all involved or considered in that case. In the Wooldridge case the surety had paid to the railway company the penalty of its depository bond and thereby became subrogated to the rights of the depositor railway company against the insolvent bank, and sought to set-off its claim arising through such subrogation against the claim of the bank's receiver against the surety on its fidelity bond executed in behalf of the president of the bank. The fidelity bond was in the amount of $25,000.00 and the amount paid to the railway company by the surety under its depository bond was the sum of $23,312.51. The amounts being about equal, the surety sought to escape payment to the receiver of the penalty of the bond executed by it for the president of the bank, by off-setting against it the claim accruing to it by sub-

rogation on account of the payment by it to the railway company, to whose rights it claimed succession by subrogation. Had the surety paid the receiver the penalty of its fidelity bond it could have required the allowance, as against the receiver, of its claim arising out of the payment to the railway company, and received dividends thereon, and to this procedure no objection could have been made. However, the surety was not content to file its claim and receive a portion of its money back by way of dividends thereon, but sought to be discharged of its indebtedness on the fidelity bond, dollar for dollar, by off-setting one transaction against the other, which was manifestly inequitable and wrong, for the reason as stated by this Court, "There would be no equity in allowing the railway company (and the surety company as its subrogee) a special claim against this bond." This Court stated that "The two transactions were wholly independent transactions and were not brought into mutual account by the parties. The Guaranty Company after the insolvency of the bank could not have bought a claim against the bank and used it as a set-off." It is manifest that there was involved in that case an entirely different situation from that in the case at bar. To state it another way, the surety in the Wooldridge case, by reason of its payment of the penalty of its depository bond to the railway company, became subrogated by operation of law to its rights, and sought to have such *subrogation* "related back" to the date of the execution of its bond, in order that it might set-off its claim so arising by subrogation against an indebtedness due from it to the bank, arising out of a separate and independent transaction, between which transactions there was no identification and no agreement to bring them into mutual account.

In the case at bar we do not claim any rights by subrogation, nor did we assert any right of set-off. These questions were not at all involved in this case, and the question here involved was not before this Court in the Wooldridge case. We are merely asking that our contract with the bank be recognized as a binding obligation upon the receiver, creating the simple contractual relationship of debtor and creditor. The equitable doctrine of set-off and the fiction of *subrogation by relation back* are not involved in this case, and it is incomprehensible why the Wooldridge case and the cases from the Sixth and Ninth Circuit Courts of Appeal above referred to, should be cited to this Court as authority for any question involved in this case.

In the case of the Fidelity & Deposit Company of Maryland vs. Robinson, from the Ninth Circuit, above referred to, the facts were identical with those in the Wooldridge case, and the case is summarily disposed of on the authority of the latter case. The same is true of the case of the Springfield National Bank vs. American Surety Company, from the Sixth Circuit, above referred to. In that case the amount of the depository bond was $50,000.00 and the fidelity bond was for the same amount, and the facts and situation of the parties were identical with the two foregoing cases. The Court there stated:

> "The two bonds were seperate transactions, totally lacking in contact. Courts of equity hold that the requisite mutuality exists where the transactions are such as to raise a presumption of reciprocal credits, or an agreement for a set-off. But the presumption cannot be indulged here. Each bond was independent of the other. It could not be supposed that when the bank agreed to indemnify the surety on the depository bond it relied on the latter's reliability on the cashier's bond (not then in existence) in the event of his defalcation or as a means of discharging it to a liability that it thereafter assumed for a wholly separate consideration. * * * The case is within the principle announced in the Wooldridge case."

It is therefore apparent that the three foregoing cases are in no sense in conflict with the case at bar. We shall not discuss the cases of Storing vs. Sutsman, 210 N. W. 653, Veigel vs. Converse, 210 N. W. 162, Gilbertson vs. Northern Trust Company, 207 N. W. 42, cited by the petitioners, for the reason that those cases are decided upon the authority of the Wooldridge case, supra, and are likewise not in point on the facts and can, of course, add nothing to the force of authority of the Wooldridge case. In order to assert a conflict between those cases and the instant case, petitioners are obliged to rely upon what the courts in those cases did not pass upon and did not discuss, and to contend "that no distinction can be made between refusing to allow the surety's claim as such and refusing to allow a credit by way of set-off therefor." We submit that the two propositions are entirely different and easily distinguishable. The confusion on the part of petitioners results from their failure to distinguish between the surety's equitable right of subrogation arising from substitution to the claims of the

creditor, and its separate and independent contractual rights against its principal arising out of its contract.

Petitioners cite the cases of Maryland Casualty Company versus Fouts, 11 Fed. (2d) 71 (Fourth Circuit) and Zimmerman versus Chelsea Savings Bank, 125 N. W. 424 (Michigan), as being in conflict with the decision in the case at bar. An examination of those cases will disclose that the surety company in each of these cases claimed to be subrogated to the rights of the state, notwithstanding the fact that the state in each case had not been repaid in full the amount of its deposit in the insolvent bank.

In the Zimmerman case the question of a right based upon the Indemnity Agreement was in no way decided, and not even remotely referred to in the decree or opinion of the trial Court, nor in the *opinion* of the Supreme Court, neither upon the original hearing, nor in the opinion upon the rehearing, found at 127 N. W. 351. It is manifest, from an examination of the opinion in that case, that the only questions *considered or decided* by the court in that case were the following:

1. That notwithstanding that the surety company paid the entire penalty of its bond, and that there was an attempted limitation therein as to the liability of the surety therein, yet so far as the question of *subrogation* was concerned the bond stood behind the whole deposit and not behind only that portion of the deposit represented by the amount of the bond.

2. That inasmuch as the state had not been repaid in full for its loss of the funds in said bank, that the surety acquired no *subrogation to the rights of the state* until the latter was paid in full.

3. That if the state had a preference right to be paid out of the funds of said bank, said right exists as a prerogative of sovereignty, but that "such question is not presented for decision in this case unless, assuming the right to exist, the intervening surety may insist upon the exercise of the right by the state."

The Court, after reviewing many decisions with reference to the question as to whether such sovereign right became vested in the state by reason of the common law, decides the question by stating that the surety, in the absence of such an assertion by the state, could not sua sponte assert such right. Therefore, it is apparent that the only

questions considered and decided by the court in that case were the surety's contention "that so much of the deposit as it secured was a separate and distinct deposit and debt and that therefore it has paid the debt in full and is entitled to that extent at least *to be subrogated* to the claim of the state against the bank," and the right of the surety to succeed by *subrogation* to the alleged sovereign right of the state. The surety company petitioned for a rehearing, as above noted, and the only question referred to or decided in the opinion of the court upon rehearing was the denial of the existence of the right of the surety to succeed to such sovereign right. *No reference was made, either in the original opinion or in the opinion on rehearing, as to the rights, if any, acquired by the surety by reason of its Indemnity Agreement.* It is apparent that the foregoing case is not in conflict with the case at bar.

In the case of Maryland Casualty Co. vs. Fouts, 11 Fed. (2d) 71, cited by the petitioners, the right of the surety company to subrogation was denied until the creditor, the state, had been paid in full. The amount of the state's deposit was $89,579.14, of which the surety paid $50,000.00 thereof, the full penalty of its bond, and then claimed the right to be *subrogated* to that extent to the rights of the state. The Court said:

> "*The right of subrogation* for the amount paid by appellant to the state depends upon whether the sum paid was in full of the liability on the indemnity bond or only on account thereof. * * * The penalty of the bond in this case, it is true, was $50,000.00 and subsequent to the bank's failure the amount of the penalty was paid by the surety; but the whole obligation of the state was by no means extinguished. On the contrary, there remained a balance of $39,579.14 due. * * * To allow this to be done would operate most unfairly against the state, whose debt was secured, and hence shows why the right of *subrogation* in such circumstances as in this case cannot be considered. *The doctrine sought to be availed of rests upon purely equitable principles.* The fact of the indebtedness on account of which the surety was given, not having been paid in full, alone requires the denial of the relief prayed for, as the right of *subrogation* cannot be availed of to collect an indebtedness by one himself liable for the debt and which obligation he has not met."

While the Indemnity Agreement is referred to in the statement of facts in the opinion of the Court, the matter of the surety's right to recover on its Indemnity Agreement was not presented squarely to the Circuit Court of Appeals for determination, nor was this question actually or necessarily determined by the Court in that case. The entire discussion of the Court is confined to the question of subrogation and the citation of cases relating to that principle alone. The Court said:

> "The doctrine sought to be availed of rests entirely upon equitable principles."

The claim presented to the receiver was based upon the alleged right of the surety to succeed by subrogation to the rights of the state and under the circumstances the receiver could not do otherwise than deny such claim. The question of the surety's legal right to direct indemnity as against its principal was used by the surety company in an effort to bolster up its equitable claim of subrogation rather than as the fundamental foundation of the suit. The action was in equity and the legal rights of the surety were in no way considered or decided or even referred to in the opinion. In writing the opinion, the court had in mind simply the question of subrogation.

That case is readily distinguishable from the case at bar, for the reason that the surety claimed to succeed to the rights of the state by *subrogation*, notwithstanding that the state had not yet been repaid in full, while in the instant case the county has long since been repaid in full and the action is not based upon subrogation to the rights of the county, but is a separate and independent claim against the receiver, arising out of the contract. In the above case the rights acquired by the surety under its Indemnity Agreement were apparently not urged by it upon the Court as a separate and independent ground for recovery, for this question is not at all considered or commented upon by the Court. Furthermore the deposit was not made pursuant to a depository law such as Section 4500, C. L. Utah, 1917, no other bonds were given by the bank, and the presumption, therefore, was that the bond in question was security alone for the whole deposit, at least so far as the question of subrogation was concerned. It is therefore manifest that there is no conflict between that case and the instant case, but on the contract, the doctrine therein announced with respect to

subrogation is wholly in accord with the weight of authority and in accordance with the decision of the Circuit Court of Appeals in the other case, claimed by the petitioners to be res judicata of the issue here involved.

In the case of United States Fidelity & Guaranty Company vs. Centropolis Bank, 17 Fed. (2d) 913, the contemporaneous case upon which the surety aspect of the instant case is decided, the surety claimed by right of subrogation as well as by contract of indemnity, but as the Circuit Court of Appeals says, "abandoned any claim under the right of subrogation and predicated their case squarely upon the contract of indemnity." It is manifest that in the Fouts case, above referred to, that while likewise both rights were originally claimed, the surety abandoned any claim by reason of its contract of indemnity and based its claim squarely upon the equitable principles of subrogation. The Court in the Centropolis Bank case clearly draws the distinction between subrogation and surety's independent claim in its own right upon contract and states, "If the question here were one of subrogation we could readily agree with the contentions of counsel for the county," and after citing ample authority to the effect that the surety is a creditor of the insolvent bank, and that it is therefore entitled to have its claim allowed and to share in the distribution of the assets of the bank, states, "This conclusion has not been reached without a careful consideration of the opinion of the Fourth Circuit in Casualty Company vs. Fouts, supra, and the Supreme Court of Michigan in Zimmerman vs. Bank, supra."

The case of United States Fidelity & Guaranty Co. vs. Union Bank & Trust Co., 228 Fed. 448, cited by petitioners, was clearly one involving only the right of subrogation, as is manifest even from the excerpts quoted by counsel from that case. The same is also true of the other cases cited by the petitioners. For instance, in the case of Dixon vs. Bailey, 33 Atl. 705, the Court says:

> "Unless the surety pays the debt in full he is not entitled to *subrogation.*"

And in Columbia Finance & Trust Co. vs. Kentucky Ry. Co., 60 Fed. 974, cited by the petitioners, the following excerpt is taken from petitioners' brief:

> "If the surety upon paying partial payment, became entitled to *subrogation* pro tanto, * * * etc."

In the case of People vs. People Bros., 254 Fed. 989, cited by petitioners, the only question involved was one of subrogation, as is apparent from the excerpts quoted from the opinion in the said case and appearing in the brief of the receiver, particularly the following:

> "Unless the surety pays the debt in full, he is not entitled to *subrogation* * * * etc."

That case is well expressed in the syllabus, as follows:

> "The surety on the bond of the contractor, conditioned for the payment of claims for labor and material, which paid only sixty-five per cent of the claims of creditors secured by the bond, on completion of the contract by a receiver, was not entitled by *subrogation* to the amount due thereon until claims for labor and material were paid in full."

The case of Board of Health v. Teutonia Bank & Trust Co., 68 So. 749, cited by petitioners, was also a case involving merely a right of the surety to succeed by subrogation, and in which the Court said:

> "There can be no *subrogation* to a right of another unless the claim of that other is fully satisfied."

No question was involved in that case of the right of the surety to recover directly from its principal by reason of an Indemnity Agreement, the only question there involved being the right of the surety to succeed by subrogation to the rights of the creditor against the bank. The same is true of the case of Fidelity & Deposit Co. of Maryland vs. Wilkinson, 69 So. 865, cited by the Petitioners. The same is also true of the case of Bank of Fayetteville v. Lorwein, 88 S. W. 919, cited by the petitioners, in which case the Court said:

> "The right of *subrogation* cannot be enforced until the whole debt is paid."

It is therefore apparent that none of these cases cited by petitioners have any bearing upon the right of a surety

to recover directly against its principal upon a contract of indemnity, as decreed in this case.

All the other cases cited by petitioners on pages 41-57 in their brief are cases which involve only the question of subrogation, and to the effect, in accordance with the great weight of authority, that the surety cannot succeed by subrogation to the rights of the creditor until the latter has been paid in full. We do not and even if we were so disposed could not dispute those cases laying down such to be the rule as to subrogation. In fact, the Court in its decision in the other case, determined that question, and it would seem to us to have been sufficient for petitioners to have cited and relied upon that case alone as to the rule of subrogation. However, that case and the other cases cited by the petitioners with reference to the question of subrogation have no application whatever with respect to the question of respondent's right to proceed directly against the bank as a separate and independent matter, based solely and wholly upon its Indemnity Agreement, as decreed by the Circuit Court herein. Petitioners have nothing to say with reference to the established principle that a surety has two rights of action, to-wit, under certain circumstances to the equitable right conventionally transferred by operation of law to subrogation to the rights of the creditors, as well as the right to reimbursement directly from its principal as a separate and independent matter.

It serves no purpose for petitioners to argue general principles with respect to subrogation and which have no application to the concrete facts here involved. No one questions the general rule with respect to subrogation. The former action was just such a case; that is to say, one of subrogation; and the Court in that action followed the rule of law laid down in those cases with reference to subrogation. These elementary rules with respect to subrogation are sustained by ample citation of authority in petitioners' brief, as is also the principle that the surety has no rights superior to those of the principle and cannot be placed in a more favorable position than the principal so far as subrogation is concerned. Petitioners' Brief 69-70. These general statements from Cyc. cited by the petitioners, are found, as would be expected, under the heading "Subrogation". It is obvious that statements from texts and cases illustrating the general rule applicable to subrogation are beside the question here involved, and illustrate the failure of petitioners to

distinguish between subrogation and indemnity. But when petitioners come to the real question here involved, there are not only no authorities cited, but very little is said by way of argument or reason in support of the proposition which petitioners must sustain in order to obtain the writ applied for.

VII.

DISTINCTION BETWEEN SUBROGATION AND INDEMNITY.

It is of course elementary and perfectly obvious that there is a vast distinction between subrogation and indemnity. Petitioners have confused these two remedies to which respondent is entitled and contend that because the Court in the other case denied to respondent the right of subrogation to the rights of the creditor to the dividends to be paid by the defendant receiver upon the deposit of the public funds of Salt Lake County, that such decision therefore decided and concluded the rights of the respondent to claim reimbursement directly from the bank, as a separate and independent matter, based solely and directly upon the Indemnity Agreement executed by the bank to the respondent as the inducement and consideration for the execution of respondent's bond.

The distinctions between subrogation and indemnity are fundamental. Subrogation is not a matter of strict right, but is founded and created on the principles of equity and benevolence. The contract herein sued upon is a contract enforcible at law, based upon contract and as a matter of strict right. The right of subrogation does not depend upon privity of contract, it is independent of any mere contractual relation existing between the parties to be affected by it. One taking by subrogation takes only such rights as had the person to whom he succeeded, the subrogee taking it subject to the limitations, burdens and disqualifications in the hands of his predecessor, while the indemnitee is limited only by the conditions and terms of the contract itself. It is apparent that a surety may be entitled to subrogation and yet may not be entitled to reimbursement. This is true as in cases of subrogation granted as against third parties with whom the surety has no contractual relation. Conversely, as in the case at bar, a surety may not be entitled to subrogation and yet be entitled to reimbursement. The surety's

right of subrogation as against the debtor does not arise until the debt has been paid in full, while under an Indemnity Agreement the surety can proceed against the principal himself to make him pay, even though the surety may have paid only a part of the debt.

In re Freeman & Co., 1 Fed. (2nd) 430, the Court stated the rule that subrogation is not a matter of contract but of equitable right.

In Northern Finance Co. v. Byrnes, 5 Fed. (2nd) 11, the Court commented on the rule that subrogation does not arise from contractual relations but is an equitable doctrine to accomplish substantial justice.

> "It is not necessary to pay the entire debt, as indemnity may be enforced upon part payment to the extent of the amount paid." Stearns on Suretyship, 3rd Ed. page 507.

In re Kimbrough-Veasy Co., 292 Fed. 757, the Court stated the rule as follows:

> "If a surety pays anything on the debt, he is instantly vested with a right of action for his reimbursement against the principal, and if he pays all, he is subrogated to the creditor's position and securities.
>
> "Subrogation is, in most cases, rather an additional remedy than an additional right, and may exist concurrently with, and as a further security to, the right to a simple action for reimbursement or exoneration. The fact that a party entitled to reimbursement and also to subrogation is entitled to two distinct remedies, seems often to be overlooked, to the confusion of both doctrines."
>
> Clark's Principles of Equity, (1924) page 605.

Petitioners' confusion in failing to distinguish between subrogation and indemnity is well illustrated by the following statement from Page 53 of their brief:

> "The limited rights which the National has in this case *spring from payment* * * * and the same reasons and the same motives have operated in the law to raise up and confer upon the surety the rights of indemnity and the rights of subrogation.

> Both rights are *conferred* upon the surety by *operation of law.* * * * A situation which has already required the Court to withhold subrogation must of necessity require it to withhold indemnity."

VIII.

ALLEGED CONFLICT BETWEEN DECISIONS OF THE EIGHTH CIRCUIT COURT IN THE TWO CASES.

Petitioners contend that the decision in the instant case conflicts with the decision in the other case because "the same fund is involved and that the decree in the first action provides that the National should receive nothing until it, the American, is paid in full;" and denied the right of the National "to in any manner deplete the funds out of which the American was to be made whole." Petitioners place a strained and unjustified interpretation upon the decision in the first case, by adding to and reading into it, that which was expressly omitted by stipulation of the parties and that which was not involved nor determined by the Court.

The Circuit Court of Appeals, in considering its own decision in the other case, properly held that it did not deny therein the right of this petitioner to reimbursement from the general assets of the bank as such, but merely the right to subrogation to dividends upon the county's deposit until the American had been paid. It is manifest that the decision in the instant case does not, as contended by the petitioners, "authorize the National to compete with the American in the enjoyment of the same fund", or, "deplete the fund out of which the American was to be made whole."

The respondent has paid the full penalty of its bond and has been postponed by the decree in the other action from sharing by subrogation in the dividends to be paid upon said deposit until the American has been repaid in full, and this too, notwithstanding that its loss is entirely due to its principal's failure to take adequate security, and that such delayed right of subrogation means nothing at all. Upon that portion of the deposit guaranteed by this petitioner, the treasurer has received not only one hundred cents on the dollar, but has also obtained a decree to the effect that this petitioner cannot share in subrogation to dividends upon said deposit until his surety, the American, has first been paid in full. It would appear to us that when the treasurer had his claim allowed in his name and for the

full amount thereof, that he had received all that he was entitled to receive from the bank, yet now his surety would claim the right to intervene in this action in order to deny to this petitioner the right of reimbursement. The petitioner, when it executed its depository bond herein, did not agree that it would not present any claim against the bank for any loss that it might sustain thereunder, and the treasurer himself having been obliged to execute a similar indemnity agreement to the American, was aware that the bank in obtaining the depository bond for him, must necessarily incur an obligation therefor. By reason of just such Indemnity Agreement, as petitioner sued on in this case, the American will receive every penny of its money back, with interest thereon at the rate of eight per cent.

IX.

PURPOSE AND PENALTY OF RESPONDENT'S BOND.

Petitioners contend that respondent's bond was security for the whole deposit. This contention is so completely answered in the opinion of the Circuit Court in the Centropolis Bank case that little more need be said in answer thereto. The Court among other things states that, "The recital in the bond that the penal sum thereof is $50,000.00 just as effectually limits the language of the condition as if there had been written into the language of the condition itself the words 'up to and including but not exceeding $50,000.00.' " (17 Fed. [2nd] 918).

Respondent's bond herein was given pursuant to Section 4500 of the Comp. Laws of Utah, 1917, to protect that portion of the public funds in an amount equal to the penalty of its bond. This Section required the treasurer to take and the bank to give "collateral security or good and sufficient surety company bonds, or personal bonds sufficient in amount to fully protect such funds." Under generally accepted legal principles this section became part of and was incorporated into respondent's bond as if it had been actually written into it. It is manifest, from a reading of this section and the action of the bank in giving, and the treasurer in taking, security in addition to that given by respondent, that it was not the intention of the law or of the parties that respondent's bond was security for the whole deposit in the sense that upon payment of the penalty of its bond, it had no claim for reimbursement. The Circuit Court

in its opinion in the Centropolis Bank case further said, "It is true that the liability under the bond was not limited to any particular portion of the whole deposit. In that sense, the bond was security for the whole deposit and for that reason the right of subrogation does not exist, but the maximum amount for which the surety company could be held liable thereunder was expressly fixed at $50,000.00. The surety company has discharged that liability by payment in full. The county has received all that it contracted for from the surety comany. How then can the county say that the spirit of the guaranty will be violated?"

The intent and purpose of the Statute (Sec. 4500) and respondent's bond given pursuant thereto was to protect the public deposit. The County has been repaid in full and the letter and spirit of the law have been complied with. Petitioners refer to "Groesbeck's deposit" as if it were a separate and distinct deposit apart from that of the county, and state that "Groesbeck's deposit has not been repaid in full." There was but one deposit and that in the name of Salt Lake County, and that has been repaid to the county in full and in part by the payment by this respondent of $125,000.00 and in part by the payment by the American of the penalty of its bond in the sum of $200,000.00. Since the county has been paid in full there is no further liability to it on the part of Groesbeck.

Where there are statutory provisions relating to the deposit of public funds, there is no authority to make the deposit except to the extent and on the terms and conditions described, 18 C. J. 580. The purpose of said laws is to provide a safe place for keeping of the public funds, and at the same time to enable the public to receive compensation for the use of its funds. Statutory provisions relating to depositories should be read in connection with the bond. As is said in the case of Talley vs. State, 121 Ark. 412, 180 S. W. 330, "The purpose of the statute authorizing the deposit of public funds is to give the county a speedy and efficacious remedy for recovery from the depository regardless of the financial condition of the depository." In this case the National Surety Company had the right to rely on the treasurer's keeping the amount of the deposit within the amount of protection taken by him. Freemont County vs. Freemont County Bank, 115 N. W. 925. The deposit was in the name of the county. Mr. Groesbeck testified upon the trial of this case as follows:

> "In drawing against that account, I was required by law and by the bank as well to secure the

> counter-signature of the County Auditor on all checks drawn by me. As a matter of fact, I had occasion to draw few checks on this account, that is, comparatively few. All warrants drawn against this bank account in the payment of salaries to employees of Salt Lake County and for bills incurred by it, are drawn and signed by the County Auditor and not the Treasurer. In other words, the Auditor drew all checks and warrants against this account, except as it might be necessary to transfer to the state or other political subdivisions of the state, their portion of the tax money collected, and then in such event I drew the check but was obliged to have the countersignature of the County Auditor. Therefore, all bills, County Bills and County expenses, were paid for by the Auditor drawing the warrants against this deposit. That is the law." (R. 157).

The Supreme Court of Utah, in the case of National Surety Company vs. Pixton, State Bank Commissioner, 60 Utah 289, 298, 208 Pacific 878, had occasion to construe said Section 4500 of the Comp. Laws of Utah, 1917, and the purposes thereof. In that case the surety, having paid to the state treasurer the amount of the state's deposit, sought to be subrogated to the alleged sovereign right of the state to the dividends to be paid upon said deposit. The Court said:

> "Under the banking laws of this state, *the state*, by its acts and conduct has clearly indicated that it claims no preferential right over the other depositors. While the law authorizes the state treasurer to deposit the funds of the state in certain banks, it also compels him to require the bank to secure the repayment of the funds so deposited. If *the state* were relying upon its preferential rights, its funds would be amply secured without requiring any security of that nature. * * * The state could well place itself upon the same footing as other depositors. This, it seems to us, it did by the passing of the banking laws and in authorizing the state treasurer to deposit the state funds in banks as others deposit their funds."

From the foregoing it is clear that the respondent's bond was given for protection of the county and its funds rather than for the protection of the treasurer or his surety, as contended by the petitioners herein. The County has al-

ways assumed the right to deal directly with the depository bondsmen, to collect from them directly, and to view the depository bonds as part of the County's security. Mr. Groesbeck himself testified on the trial of this action that the respondent paid the penalty of its bond in the sum of $125,000.00 *to Salt Lake County.* (R. 155). As the record shows, the treasurer's bond was but $200,000.00, and this too, notwithstanding the fact that the treasurer collects each year the taxes for the state, city and county, amounting to in excess of eight million dollars, and at the time of the failure of the bank, had on deposit in excess of $643,000.00. Section 4500 contemplates that the county treasurer shall take depository bonds and collateral security and that he shall do so by way of protection to the County. If the taking of depository bonds is merely a matter in which the treasurer is personally interested and with which the county has nothing to do, what was the necessity for the legislature enacting such a law? The very language of the act itself indicates beyond question that the bonds therein provided for are for the protection of the public funds.

In the case of Cole vs. Myers, American Surety Company, et al., 100 Neb. 480, 160 N. W. 894, the Court said:

> "The bond was given to protect legal deposits of county funds to the contractual and statutory maximum of $10,000.00 and not as security for illegal deposit in excess of that sum. Both the surety's liability and the debt protected by the suretyship are limited to $10,000. In paying the amount of the bond the bank's surety not only discharged its legal liability but also discharged the entire debt to secure which the bond was given. The terms of the contract of suretyship, when considered with the statute and with the public duties of the treasurer, will admit of no other construction."

The record herein and the admission of the American in its brief relative to the receipt by it since the trial herein of the sum of $90,000.00, on account of the Crystal Lake Bonds, conclusively shows as we shall hereafter point out that the American has been repaid by the bank the full penalty of its bond, together with over $15.000.00 interest.

The American complains that by the allowance of respondent's claim, the receiver will be obliged to pay it immediately the same dividends as heretofore paid to the other

creditors, to-wit, sixty per cent, and that this will amount to $75,000.00, but that inasmuch as the county's deposit was more than one-third of all the approved claims, that one-third of every dollar paid the respondent will be at the expense of the American; also that by reason of the decree herein the American "will be short thousands of dollars", and hence, the decision herein is inequitable. While such argument is not a legal argument, and even if true would not be material to the decision of the question here involved, yet feel that we should point out the discrepancies therein. The total amount of approved claims against the bank was $1,583,926.88, (R—70), and therefore the allowance of respondent's claim by the Trial Court and the Circuit Court of Appeals increased the approved claims by $125,000.00, or less than one-tenth additional. Sixty per cent in dividends have been paid so far by the receiver. The county has been repaid the full amount of its deposit in the manner shown at page twenty of petitioners' brief. As hereinbefore pointed out, the addition of respondent's claim increases the approved claims by less than ten per cent, hence it is difficult to see how it will reduce payments to the American by one-third.

Moreover, the American will not be short "thousands of dollars" by reason of the allowance of our claim as it represents. In fact, at no point in its application or brief herein does the American make a disclosure to this Court either as to the amount of money already received by it pursuant to the decree in the other action, or as to the balance yet claimed to be due it. *The facts* are these, the American did not pay to the County the penalty of its bond in the sum of $200,000.00 until February 29, 1924, more than two years after the failure of the bank, and after a judgment agaist it in favor of the County was affirmed by the Supreme Court of Utah, (R—97), said judgment being for the sum of $200,000.00, the penalty of its bond, together with $23,-262.13 interest on said sum from the date of institution of suit therefor. (R—78, 97).

Upon the trial of this case it appeared that the American had received from the receiver through subrogation to the dividends upon the deposit of the funds of the County, the sum of $125,780.72. (R. 125). The receiver alleged in his answer herein (R. 26), and upon the trial of the action testified that he had paid sixty per cent in dividends and expected to pay an additional fifteen per cent dividend. (R. 70). Mr. Jensen, attorney for the American, stated to the Court upon the trial of this action, "There is a balance due the Amer-

ican of $125,666.00. (Including interest). If an additional fifteen per cent is paid it would run around eighty-eight thousand dollars, and after the payment of that amount the American would still be short $40,000.00." (R—73). However, *since the presentation of this case to the Circuit Court of Appeals, the Crystal Lake bonds, which the receiver in Paragraph 24 of his Answer herein (R—26) alleged, "are worthless, and no money has been or can be realized therefrom", have been sold for $90,000.00 by the American pursuant to the decree in the other action.* While this is admitted in petitioners' brief at Page eighteen thereof, no statement whatever is made as to the amounts repaid to the American or the balance yet claimed to be due it. So that the American, according to the record herein, has to date been reimbursed on account of the penalty of its bond, $125,780.72 by dividends paid to it by the receiver, together with the further sum of $90,000.00, arising from the sale by it of the Crystal Lake bonds, a total of $215,780.72, which amounts to $15,780.72 in excess of the penalty of its bond; and assuming it is entitled to interest as claimed by it, to the date of payment by the receiver, it will further receive according to the receiver's best judgment, even with the allowance of our claim, seven per cent additional in dividends on $568,094.29, which will amount to approximately another $40,000.00, or a total of approximately $255,780.72. It appears to us that instead of being entitled to sympathy, the American is to be congratulated as being the only creditor of the bank to be paid not only its claim in full, but approximately $55,780.72 interest thereon, and this too, notwithstanding that according to the receiver's best estimate he will be able to pay creditors (with the allowance of respondent's claim) only sixty-seven per cent.

However, even if the decree herein should occasion a slightly smaller recovery to the American, and that by way of interest only, it is no reason for setting aside and abrogating the valid contract made between the bank and respondent.

X.

THE NATIONAL BANKING ACT

Petitioners complain that, "The penalty of the National's bond never went in to the assets of the bank for ratable distribution to the creditors," and that therefore the decision herein results in an unfair distribution of the bank's

assets among its creditors, in violation of the national banking act. Just why this should have been done in order to justify the allowance of respondent's claim as herein decreed, we do not understand, nor is it made clear by the petitioners. Clearly respondent was a creditor of the bank and had its claim not been allowed it would have been a violation of respondent's constitutional rights. The obligation of the bank to the county and its obligation to this respondent were entirely separate and independent matters. The question here involved is not the bank's obligation by reason of the deposit, but its obligation to this respondent by reason of the express contract, by reason of which it became a creditor of the bank. To deny respondent the rights of such a creditor would have "eventuated in an unfair distribution of the bank's assets among its creditors."

Petitioners contend that the effect of the decision herein is to permit the deposit of public funds to draw additional dividends, but this contention entirely overlooks the fact that respondent's rights under its Indemnity Agreement are in its own right entirely independent and apart from the rights of the depositor, and that the payment decreed to it is not on account of the deposit but by reason of a separate obligation. Moreover, the county has been repaid in full and in part by this respondent of $125,000.00 of its obligation. It is not a question of the public deposit drawing further dividends, but of the right of this petitioner to recover upon its express contract. However, Petitioners entirely overlook the fact that the Indemnity Agreement herein sued upon gives the respondent any rights.

> "It often happens that the same transaction or state of facts gives distinct rights of action to or against different persons, or to the parties mutually against each other." Black on Judgments, 2nd Ed. Vol. 2, p. 1125.

The deposit here in question gave the county and the treasurer a right against the bank for a recovery of the money and in turn gave the respondent a right under its Indemnity Agreement to recover as against the bank for any loss that it might sustain. In other words, this deposit of public moneys made under the provision of Sec. 4500 of the Comp. Laws of Utah 1917, created two obligations on the part of the bank. If the bank borrowed the Crystal Lake bonds in order to pledge them as security for the repay-

ment of the deposit, it in turn incurred another obligation. The receiver does not complain that the proceeds of these bonds in the sum of $90,000.00 received by the American Surety Company, "never went into the assets of the bank for ratable distribution to its creditors." In other words, the receiver seems to appreciate that under said Section 4500 the bank may pledge collateral to secure the repayment of the public deposit, and in fact may borrow or obligate itself to secure the same, but is apparently unwilling to admit that the bank incurred any obligation to respondent by reason of its Indemnity Agreement herein, which was the consideration to respondent for the execution of its bond. This bond relieved the necessity on the part of the bank of furnishing additional collateral to the county to secure its deposit. The Circuit Court of Appeals could see no distinction between the bank pledging its own assets such as the Crystal Lake bonds and to which the receiver made no objection, and incurring an obligation to a surety company whereby it agreed to reimburse the surety for any loss it might sustain by reason of pledging its credit for and on behalf of the bank. The bond of respondent stood in lieu of further collateral and enabled the bank to keep its assets in its own vaults. Had the bank borrowed the Crystal Lake Bonds or executed an indemnity agreement to secure them, then such indemnity agreement would have been another enforcible claim against the bank.

XI.

THE CONTRACT SUED UPON.

Prima facie petitioner is entitled to recover upon the Indemnity Agreement herein sued upon. The authorities generally sustain the right of a surety to recover from its principal under such an agreement. Petitioners have not cited a single case to the contrary. As hereinbefore pointed out, all the cases cited by petitioners relate to the question of subrogation.

The Circuit Court of Appeals, in the instant case, decided against the petitioners the issue of res judicata raised by them, and founded its decison as to the merits of the case, that is, petitioner's right to recover upon its Indemnity Agreement, upon the decision of that Court in the case of United States Fidelity & Guaranty Company vs. Centropolis Bank, 17 Fed. (2d) 913. The petitioners attack the

the able decision of the Court in that case and contend that it is contrary to the weight of authority. The only cases cited by petitioners which bear any resemblance whatever to the instant case are those of Maryland Casualty Company vs. Fouts, 11 Fed. (2d) 71, and Zimmerman vs. Chelsea Savings Bank, 125 N. W. 424. We have heretofore, in our brief, reviewed these two cases and pointed out the distinction betwen them and the instant case. At first blush the Fouts case might appear to be similar, yet a scrutiny of that case will disclose that the facts, the parties and the theory upon which the case was presented to the Circuit Court of Appeals, are altogether different from those in the instant case. In that case the depositor, the county, had not been paid in full and the surety company sought to be subrogated to the dividends to be paid upon the deposit of the county, prior to the payment in full to the county. The Fouts case was presented to the Court wholly upon the subrogation theory, just as was the former case relied upon by the petitioners herein as res judicata. In neither case did the Court decide the right of the surety to recover upon its Indemnity Agreement.

In the Zimmerman case the Court held that the surety acquired no subrogation to the rights of the state until the latter was paid in full, and no reference whatever was made either in the original opinion or in the opinion on rehearing as to the rights, if any, acquired by the surety by reason of its Indemnity Agreement.

The two cases last mentioned were urged by the petitioners upon the Circuit Court of Appeals in the Centropolis case, but the distinction between the questions involved in those two cases and the instant case, as well as the Centropolis case, were observed by the Circuit Court of Appeals in the Centropolis case, the Court stating therein:

> "This conclusion has not been reached without a careful consideration of the opinion of the Fourth Circuit in Casualty Company vs. Fouts, supra, and the Supreme Court of Michigan in Zimmerman vs. Bank, supra."

The cases cited by the Circuit Court of Appeals, in its opinion herein, United States Fidelity & Guaranty Company vs. Carnegie Trust Company, 164 N. Y. S. 92, 221 N. Y. 646, 117 N. E. 1086, American Surety Company of New York vs. National Bank of Barnesville, 17 Fed. (2d) 942, and

In Re Dailey and Ivins, 19 Fed. (2d) 95; Affirmed by the Third Circuit Court of Appeals in Tenant vs. U. S. F. & G. Co., 17 Fed (2d) 38, are not only directly in point, but are in accordance with the weight of authority that the surety is a creditor of the bank and has a right to have its claim allowed and dividends paid to it thereon.

The case of Mellette Farms Elevator Co. vs. Poehler Company, 18 Fed. (2d) 430, is also directly in point, and the Court in its opinion clearly distinguishes between subrogation and indemnity.

The sole question presented is the enforcibility of a contract. In consideration of its becoming surety, the respondent company received an agreement indemnifying it against loss on account of its suretyship. The loss was sustained, and payment made to and accepted by the creditor. The claim is now made for reimbursement. The promise to indemnify contained in the agreement of indemnity is admittedly valid. All of the authorities hold that it constitutes the promissee a creditor of the indemnitor, and its breach gives rise to an action at law. The Circuit Court of Appeals simply enforced our legal rights under this contract. The surety of course, has other rights—some of them are conditional and some are equitable. However, we seek none of these additional rights, and cases dealing with the effort of the surety to obtain other benefits are not in point. Our claim is based solely upon the direct and independent contractual obligation of the bank. Discussion of equities and rights which we are not seeking is obviously futile.

Respondent's claim is a valid and outstanding obligation against the bank, upon which a claim may be properly asserted against the receiver, just as on any other debt of the bank. The respondent is in the same position as a depositor or merchant who has supplied fixtures, gas, electric light, or the landlord to whom the rent is due. The National City Bank could not do business without having such creditors, nor could it do business with public funds as a deposit without giving a bond (Sec. 4500, C. L. Utah, 1917). The bonding company was as essential to its doing business as the landlord or the company which furnished light, gas or heat. It was one element and unit that went to furnishing the bank its business and to make it possible to do business. The decision of the Circuit Court is founded on basic principles and fundamental facts, to-wit, that a contract is a

contract, and means what it says, and that when an indemnitor on a bond pays out money for a principal on its obligation upon the promise of the latter to fully indemnify it, as in the case at bar, it is a creditor of the principal and on a par with all other creditors, including those who furnished supplies for the bank or who deposited money therein. Without this Indemnity Agreement respondent would never have signed the bond for the bank. Its premium was fixed on that basis. The language of the Indemnity Agreement made the respondent a creditor of the bank, and the bank therein pledged its *assets* to the discharge of such obligation. (R.-10). All that any creditor of the bank had was its obligation to pay, and some of these creditors only had that orally or by implied contract. All creditors of the bank are upon this same basis. The National Banking Act makes no distinction between creditors. What equity would there have been in the Court's holding that respondent's contract and the obligation to it was a mere scrap of paper, simply because the American would suffer a smaller recovery out of a loss it sustained by failure of the bank? The Circuit Court undoubtedly concluded that there was no injustice in respondent's participating in the assets of the bank on an equal footing with all other general creditors of the bank, and had the Court taken any other position we respectfully submit that it would have been illegal and in violation of the contract and of the constitution of the laws of the State and the United States.

The sole issue upon the appeal in this case, outside of the question of res judicata, was the right of the surety to enforce its Indemnity Agreement. Subrogation is not involved directly or in directly, and the discussion of subrogation accomplishes no purpose except to obscure the real question at issue. We respectfully submit that there will not be found in petitioners' brief any real discussion of the right of the surety to have its claim allowed by reason of the contractual Indemnity Agreement existing between the surety and the bank. Petitioners nowhere discuss that contractural relation, nor do they cite any law, authority or reason for the abrogation of the contractual right, and we respectfully submit that the cases cited by the Circuit Court of Appeals in its opinion in the Centropolis Bank case are directly in point.

Looking at the question as one of first impression, we respectfully submit that the fundamental principles of law,

justice and reason, justified the Circuit Court in upholding the contract of indemnity, as no just, valid or legal reason can be given for the abrogation of the contract or for arbitrarily setting it aside. To have done otherwise would have been in violation and stultification of the law. Petitioners have cited no cases involving the situation and question presented to the Circuit Court of Appeals.

Petitioners contend that the case of United States Fidelity & Guaranty Company vs. Carnegie Trust Company, 177 App. Div. 176, 164 N. Y. Supp. 92, affirmed 221 N. Y. 646, 117 N. E. 1036, cited by the Court in its opinion in the Centropolis Bank case, does not support the decision in that case, and to prove such assertion quote from the dissenting opinion. The view of the majority of the Court is expressed in the following language:

> "It does not follow, however, because the surety cannot be subrogated to the rights of the bankruptcy creditors that it has no claim for the moneys paid on the surety bond. The Carnegie Trust Company gave its Indemnity Agreement covenanting to make good to the surety company any moneys which that company should be compelled to pay under its bond. The surety company thus has become the creditor of the Carnegie Company to the extent of the required payment, and its right to its dividends cannot be impaired by the fact that the claim arises upon a payment of a deficiency upon another debt of the Carnegie Company, which has already had its full dividends. *To hold otherwise would hold nugatory the indemnity agreement.* The authorities holding that one debt of a bankrupt cannot create two liabilities against the estate apply only where a creditor is thus seeking an undue proportion of the assets of the bankrupt. No such result can be here reached and the surety's claim here arises as any other claim might arise, out of a contract which itself contemplates the possible inability of the debtor to pay a certain debt in full."

The foregoing opinion of the lower Court was affirmed by six of the seven judges of the New York Court of Appeals as is shown in 221 N. Y. Rep. 646, wherein, with reference to the facts it is stated:

> "The plaintiff offered for filing a claim against the Carnegie Trust Company in liquidation for reimbursement for the payment thus made. *The plaintiff founded its claim upon the indemnity agreement.* The defendant rejected the claim."

While that Court would not have accorded to the surety the right of subrogation until the creditor was first paid in full, it did allow the claim of the surety for reimbursement under its Indemnity Agreement as a separate and independent matter and obligation. Paragraphs 7 and 8 of the Indemnity Agreement (R. 61) of the respondent, are identical with the indemnity agreement considered in the case last mentioned above, and reserve the right to this respondent to look to and rely upon the property of the depository and its income and earnings and to follow and recover out of its property for anything due or to become due to the respondent under said agreement. This Indemnity Agreement taken by the respondent from the bank was the inducement for the execution of its bond, and was for the specific purpose of protecting the respondent, particularly in the event of the failure of the bank. The failure of the bank does not, of course, destroy the right of the respondent to follow and recover its pro rata share of the assets of the bank, said right being expressly contracted for in said Indemnity Agreement.

> "It frequently happens that on the creation of the suretyship relation the principal enters into an express contract with the surety, whereby he undertakes to indemnify him for any loss that he may sustain as a result thereof." 21 R. C. L. 1097.

> "On payment of the principal's debt, the surety becomes a simple contract creditor of the principal." 21 R. C. L. 1097.

We have not been able to find a case holding that a surety cannot recover on an Indemnity Agreement. On the contrary, the courts hold that it is competent for parties to make a contract, agreeing on liability on the part of the principal, even before the surety has actually made payment of the debt. Pingree on Surety and Guaranty, 2nd Ed. Sec. 182. Cooper v. Barker, 57 So. 472.

A fortiori it is competent for them to agree on liability of principal to the surety after payment.

In the absence of an express contract of indemnity, the principal is bound, but the parties may, however, by express contract, provide for enlarged indemnity.

> "It is competent for the principal, by express contract with the surety, to enlarge, restrict or entirely take away the right of indemnity." Childs Suretyship and Guaranty, p. 294.

Many cases might be cited illustrating the principle that the implied indemnity from the principal to the surety may be enlarged upon by express contract. For instance, agreements in which the principal agrees to reimburse the surety for all costs, counsel fees and expenses which the surety may incur by reason of the execution of the bond; and also agreements wherein the surety, as in the case at bar, is given the right to follow and recover from the assets of the principal any sums of money which it may have been obliged to pay out under the obligation assumed by it.

The authorities uniformly hold that it is within the power of a bank to secure its depositors for deposits made with it.

> "Giving a bond to secure funds deposited with them is within the power of a national bank, and sureties on such bonds are liable." Michie on Banking, Vol. 3, p. 2026.

See also State v. First National Bank, 88 Fed. 947.

A national bank may secure its depositors by bond or any other lawful means. Inter-State National Bank v. Ferguson, Treasurer, 30 Pac. 237, 7 C. J. 817.

In the case of Gronbald v. Federal Union Surety Company, 212 Fed. 908, the court, speaking through Judge Sanborn, upheld and enforced an Indemnity Agreement given by and in behalf of a bank to the surety company as consideration and inducement to the surety company for the execution of its depository bond to the state.

In the case of American Surety Company v. Thurber, 21 N. Y. St. Rep. 459, it was held that the extent of the principal's liability under such a contract of indemnity, depends on the wording thereof, and the agreement is to be

construed to give effect to each and every part thereof, according to the intentions of the parties at the time.

In the case of Kilpatrick v. U. S. F. & G. Co., 228 Fed. 591, it is stated:

> "It is a fundamental principle of the law of suretyship, recognized alike under the decisions of the Alabama Courts and the Federal Courts, that the indebtedness of a bankrupt principal to his surety, who subsequently discharges the obligation in whole or in part, takes effect from the date the surety executed the instrument which binds him; and that in the event the surety discharges the debt of the principal, after the principal's adjudication as a bankrupt, his surety is indemnified, in that he has a proveable and likewise a dischargeable debt which had its origin prior to the adjudication. In Re Stout, 109 Fed. 794; Livingston v. Hieneman, 120 Fed. 786; Remington on Bankruptcy, Sec. 611 and 614; Loveland on Bankruptcy, Sec. 304, 329, 330; In Re O'Donnel, 131 Fed. 150."

> "It is competent for the principal and surety to enter into whatever express contract they will touching the reimbursement of the latter. The surety may contract for more than strict indemnity, or may bargain away his right to indemnity entirely, though stipulations claimed to have the latter effect will be strictly construed in his favor." Spencer on Suretyship, p. 159.

> "Unlike the right or equity of subrogation, the right to indemnity becomes enforceable whenever the surety has paid any part of the debt for which he is liable." Spencer on Suretyship, p. 162.

That the surety has the right to determine the conditions upon which it undertook the suretyship and made this contract of indemnity, seems to be beyond question. The contract of indemnity on the part of the bank is as valid and binding as the bond was on the part of the surety company, or any other obligation which the bank might have made prior to the receivership. Respondent's claim herein is independent of the claim of the county or the treasurer or any other depositor, and is a valid claim separate and distinct from the claim of the county or any other depositor.

It is a separate and distinct obligation entered into between the bank and the respondent, for a valuable consideration and without which the bank would not have had the county's deposit. It is an independent contract and liability and responsibility.

The general creditors of the bank became such with full knowledge that it was a depository of public funds and as such required by law to furnish a depository bond. They are charged with knowledge of the law, Sec. 4500 C. L. Utah, 1917, that in the event the surety should suffer a loss by reason of its execution of such a depository bond, it would be entitled to indemnity against the bank and entitled to the same rights as each and every other creditor by reason of such contract of indemnity. Surely they cannot be heard to complain, and especially the treasurer and the American Surety Company herein, by reason of the allowance and payment of respondent's claim herein, based upon said contract, of which they must be held to have notice. Treasurer Groesbeck himself was required to execute an Indemnity Agreement to the American Surety Company in order to secure his official bond, under which Indemnity Agreement said surety company was given the right by subrogation to succeed to his claims against the bank. (R. 125-131). The treasurer did not have to make his deposit under the depository bonds unless he wanted to.

Therefore, both Treasurer Groesbeck and the American Surety Company knew of the practice of surety companies to take such Indemnity Agreements and that the bank was required to execute an Indemnity Agreement to this respondent to secure its depository bond, and that such an agreement would become an abligation binding upon the bank in the event of its failure. The deposits were all made with the knowledge of a possibility of insolvency and a failure to be able to pay in full by the bank, and we see no reason why the creditors, including this respondent, do not stand on the same footing.

It is contended by the petitioners that the allowance of respondent's claim would take from the American. In the first place, we do not think that this is a defense that may be made by the receiver; but suppose the allowance of our claim should take from the American, yet so it would from every other creditor of the bank, just as any claim on any obligation entered into by the bank would do.

> "It may be stated generally that, in order that any matter may be set up as a defense to an action on a contract of indemnity, it must be germane to the cause of action pleaded, and present a legal reason why the indemnitee should not recover." 31 C. J. 459.

The claim herein sued upon is a valid and enforceable claim and the Court cannot make a new contract for the parties nor modify the one made, but must enforce the contract as made.

Certainly general depositors of the bank occupy no position other than that of common creditors. A depositor has no greater claim upon the assets of the bank than any other creditor of the bank.

> "Since general depositors are merely general creditors, they are only entitled to share pro rata with other general creditors in the distribution of the funds of an insolvent bank." Michie on Banking, Vol. 1, Sec. 80, p. 603.

Numerous authorities might be cited to the effect that a depositor stands on no better footing than any other creditor of the bank in the distribution of its assets. If the National is not a creditor of the bank, then what position does it occupy by reason of its Indemnity Agreement?

In Swartz v. Siegal, 117 Fed. 13, at page 17, the Court, speaking through Judge Sanborn, said:

> "One who loans his credit to another is as much his creditor as one who loans his money to him. A creditor is 'one who has the right to require the fulfillment of an obligation or contract. Bouv. Law Dict. page 1435.' "

The respondent National Surety Company loaned its credit to the bank in order that the bank might secure the deposit of public funds which the latter was desirous of receiving under the provisions of Section 4500 Comp. Laws of Utah, 1917, authorizing the deposit of public funds with banks, and was willing to furnish a depository bond as well as to pay interest upon the money so deposited, as provided by the provisions of that act, and the receipt of this deposit was a distinct benefit to the bank; and to secure the loan

of the credit of the National Surety Company, it executed to the latter the Indemnity Agreement herein sued upon.

The Indemnity Agreement executed by the bank is recognized by all the authorities to be a valid and enforcible agreement, and the National's rights thereunder are just as great in case of the insolvency of the bank as had the bank remained solvent.

> "The contract gives the surety rights beyond those implied in law. Such a contract is legal and may be the basis of a recovery." In Re Dailey, 19 Fed. (2d) 95.

In fact, if the bank were solvent there would be no occasion to rely upon the specific terms of the Indemnity Agreement giving this respondent the right to follow and recover out of the bank's assets for any loss that it might sustain.

The assets of the bank were increased by $643,000 odd dollars by reason of the deposit of public funds, same being more than one-third of all of the deposits in the bank, the bank had the benefit of such deposit, and the receiver would now repudiate the contract under which such funds were loaned to the bank. The bank itself, had it remained solvent, could not have refused reimbursement to this respondent, nor can the receiver, inasmuch as the rights of this respondent are not diminished or varied by reason of his appointment. See Michie on Banking, Vol. 1, Sec. 77, p. 542.

The surety has its remedy against the principal and such action is in its own right and as a result of its contractual relation, as distinguished from any right conventionally transferred from the creditor whom it has paid. It is true that the surety may be subrogated to all the liens, privileges and other incidents of the claims of the creditors, but this is a legal consequence which cannot affect the individual cause of action which the surety has directly against its principal by reason of express contract.

By reason of said Indemnity Agreement and the payment by the respondent thereunder of the sum of $125,000.00 in behalf of said bank, it became a creditor of said bank in said amount. By the specific terms of said Indemnity Agreement the respondent acquired the right to look to the property of the bank and to follow and recover the same in the hands of the receiver, said Indemnity Agreement

being taken for the specific purpose of protecting the respondent, particularly in the event of the failure of the bank. The promise and agreement of the bank can be fulfilled only by the allowance of respondent's claim against the general assets of the bank and the direction to the receiver to pay to the respondent dividends thereon. The respondent has performed to the fullest its every obligation, a duty which it assumed only upon the express agreement of the bank to indemnify, and the Court below has required the bank to fulfill its coincident obligations to the respondent..

CONCLUSION.

It is apparent that the brief of petitioners is an extensive re-argument of the questions of fact and law presented to the Circuit Court of Appeals. It is also obvious that in order to attempt to escape the well-settled principle that a surety has a right of action for reimbursement against its principal, the petitioners were obliged to plead the technical defense of res judicata, and to introduce in evidence a great mass of testimony from the records and brief in the other case. This of necessity involves a consideration of a question of fact, as well as one of law, and both questions were determined against them. This Court has repeatedly held that certiorari will not issue to review what are primarily questions of evidence or fact.

The case involved a construction of local statutes and decisions construing the same, and a consideration of the form and interpretation of certain contracts. The decision is not merely in accord with the weight of authority, but is decided upon well-settled principles of suretyship law. Petitioners have completely failed in their effort to show that there is a conflict of authority between the Circuit Courts of Appeal, the cases cited by them being readily distinguishable from the instant case.

It seems altogether unnecessary for this Court to instruct the Comptroller of the Currency that a contract of indemnity, such as herein sued upon, creates an obligation on the part of the bank. This principle has been sustained by the Federal Courts on so many different occasions that it cannot be said that there is any conflict of authority in any of the cases where the matter has been presented

squarely to the Court. It is also apparent that no question in this case involves the interpretation of the National Banking Act and that no question of peculiar gravity or general importance is involved, either as a matter of fact or as a matter of law.

It is respectfully submitted that the grounds urged by petitioners for the petition do not exist, and that this case is in no sense an extraordinary one, justifying the interposition of this Court. As was stated by this Court in Magnum Import Company vs. De Spoturno Coty, Supra, jurisdiction in certiorari was not conferred, "merely to give a defeated party in the Circuit Court of Appeals another hearing."

Respectfully submitted,

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Attorney for National Surety Company, Respondent.

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Of Counsel.

MAR 6 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 424.

EDWARD E. JENKINS, RECEIVER OF THE NATIONAL CITY BANK OF SALT LAKE CITY, UTAH, ET AL.,
Petitioners,

vs.

THE NATIONAL SURETY COMPANY,
Respondent.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

A. E. MORETON,
Attorney for Respondent.

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Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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Petitioners,

vs.

THE NATIONAL SURETY COMPANY,
Respondent.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

OPINIONS OF COURTS BELOW.

The decision of the court below, the Circuit Court of Appeals of the Eighth Circuit, appears at page 231 of the Record herein, and is reported in 18 Fed. (2d) 707. That decision, dated March 28, 1927, was by a unanimous court. A rehearing was denied on June

14, 1927 (R. 257). The decree of the District Court for the District of Utah in this case appears at page 51 of the Record. The opinion of the Circuit Court of Appeals deals mainly with the defense of *res judicata.* The decision on the merits is made to rest upon the decision of the same court in the case of U. S. Fidelity and Guaranty Company vs. Centropolis Bank of Kansas City, 17 Fed. (2d) 913, which case was argued before that court upon the same date and before the same judges as this case.

The decree in the case of Salt Lake County, American Surety Company and E. J. Groesbeck, Treasurer, vs. Edward E. Jenkins, Receiver, claimed by the petitioners to be *res judicata* of the issues here involved, appears at page 107 of the Record, and the opinion of the Circuit Court of Appeals of the Eighth Circuit, 5 Fed. (2d) 34, affirming that decree, appears at page 110 of the Record.

JURISDICTION.

A writ of certiorari was granted by this Court on October 31, 1927, upon the request of the petitioners, and the Comptroller of the Currency who appeared as *amicus curiae,* jurisdiction of the court being invoked under Section 240 (A) of the Judicial Code as amended by the act of February 13, 1925 (C. 229; 43 Stat. 936, 938).

STATEMENT OF THE CASE.

The respondent, the National Surety Company, brought this action against Edward E. Jenkins as Receiver of the National City Bank of Salt Lake City, Utah, to compel the allowance of its claim upon an indemnity agreement, entered into by the said bank and

the National Surety Company, and the payment of dividends thereon.

The complaint herein (R. 1) alleges that on the 3rd of January, 1921, the respondent, National Surety Company, upon the application of the said bank, executed and delivered to Edward J. Groesbeck, as Treasurer of Salt Lake County, Utah, its certain bond (R. 12) in the sum of $125,000.00, guaranteeing the repayment of such sums as the said Treasurer might deposit in said bank up to the penalty of the bond; that, as an inducement to and consideration for the execution of said bond, the said bank made and executed and delivered to the respondent a certain indemnity agreement (R. 6-11) wherein it agreed to indemnify the respondent and save it harmless from all claims and demands whatsoever on account of its execution of the said bond, and to pay over, reimburse and make good to the respondent all sums of money which it might be obliged to pay by reason of having executed said bond; that in said indemnity agreement the respondent was given the right to look to and rely upon the property of the bank and its income and earnings, and to follow and recover out of the bank's property then belonging to it, or which might thereafter belong to it, and the income and earnings thereof, for anything that might become due to the respondent under said indemnity agreement.

The complaint further alleges that on the 17th day of January, 1922, the bank failed and this respondent, on June 17, 1922, paid to Salt Lake County and Edward J. Groesbeck, its Treasurer, the full sum of $125,000.00; that by reason thereof the Receiver of said bank is indebted to the respondent in the sum of $120,000.00 ($5,000.00 of its claim having been assigned

to the American Indemnity Company); that, prior to the commencement of this action, the plaintiff on April 10, 1925, duly presented to and filed with the defendant Receiver its verified claim for said sum of $120,000.00 by virtue of said indemnity agreement, and demanded that the Receiver approve its claim as a creditor of said bank in the said amount, but that this the defendant had refused and still refuses to do. (R. 5.) A copy of the said claim is printed in the Record (R. 13-17) as a part of the complaint. The said complaint concludes with a prayer that the respondent's claim based upon said written indemnity agreement be allowed and approved in the sum of $120,000.00 and that dividends be paid to it upon the same basis as other common creditors of the bank. (R. 6.)

The Receiver answered and prayed that Treasurer Groesbeck and the American Surety Company, who was surety on an official bond given by the said Groesbeck to Salt Lake County, be required to interplead in the action and set up their claims, if any, "to the assets of the National City Bank of Salt Lake City, Utah, now held and possessed by defendant as Receiver." (R. 28.) The court ordered that Groesbeck and the American Surety Company appear in the action and set forth their claims, if any, "to the property, subject of said action." (R. 29.) Thereupon Groesbeck and the American Surety Company filed their answer (R. 30). The answer of the Receiver, as well as that of the American Surety Company and Groesbeck, set up the decree in the case of Salt Lake County, *et al.* vs. Jenkins, *et al.*, 5 Fed. (2d) 34, and alleged that, under the doctrine of *res judicata*, the National Surety Company was estopped from asserting its claim under its said contract of indemnity and

from receiving dividends thereon out of the assets of the insolvent bank (R. 25, 33). These answers also alleged that the National was not entitled to participate in such dividends until the American had been paid in full under its right of subrogation to the claim of Salt Lake County and Treasurer Groesbeck.

In support of its complaint the respondent proved the execution of its indemnity agreement and of its depository bond; that the said bond was given pursuant to Section 4500 of the Compiled Laws of Utah, 1917; that Groesbeck, as Treasurer, deposited the funds in the said National City Bank; that the respondent on June 17, 1922, paid the penalty of its bond in the sum of $125,000.00; and that it had not been repaid any part thereof. (R. 65.) This made a *prima facie* case for the respondent. In support of this contention that the cause of action herein sued upon was *re judicata*, petitioners introduced in evidence the pleadings and decree and extracts from the record and briefs in the earlier case. In rebuttal the respondent in turn offered other extracts from the said record and briefs.

The decree of the trial court in this action (R. 52) approved and allowed respondent's claim, but subject to the conditions, limitations and qualifications (1) that the respondent should recover nothing from the bank until and after such time as the claims of the American Surety Company, growing out of its fidelity bond written for Treasurer Groesbeck, had been paid in full as provided in the decree in the earlier case; (2) that the allowance of the respondent's claim should not affect the existing basis of computing and paying dividends as established by the Receiver upon claims theretofore approved; (3) that the Receiver should not set up on his books the claim of respondent which

had been "approved and allowed" nor set aside any funds or assets for the payment of dividends thereon. The right of the respondent to share in dividends at the time of the decree was denied, and the decree recited that respondent's right, on account of its indemnity agreement, to participate in the assets of the bank, as against the defendant Receiver and other creditors of the bank, after the payment of the American Surety Company in full, was not determined.

The Case Transferred From the Law to the Equity Side of the Court.

This case was started as an action at law. At the conclusion of the trial the court, on its own motion, transferred the case from the law to the equity side of the court, with an exception to plaintiff as appears from the following:

> "Plaintiff's claim as such is not really denied by the answers in the case. It is admitted that you paid the amount alleged, and that being admitted, it follows that your claim is an allowable claim to be paid under conditions out of the assets of the bank. It should be paid by the Receiver if any funds are ever available. Defendants set up as a defense that this matter is *res judicata* and that plaintiff, as the result of the situation of the parties, is not entitled to share in the funds. It seems to me these are equitable matters properly triable in a court of equity and I shall so treat it and order it tried upon the equity side of the court, and plaintiff may have on exception." (R. 212.)

For brevity, Edward E. Jenkins as Receiver will be hereinafter referred to as "Receiver"; E. J. Groesbeck, Treasurer, will be referred to as "Groesbeck"; the National Surety Company as "the National"; the

American Surety Company as "the American" and the National City Bank as "the bank."

QUESTIONS IN THE COURT BELOW.

The essential questions for determination by the Circuit Court of Appeals were:

(1) Whether the present action is *res judicata* by reason of the decree (R. 107) in the earlier case hereinbefore referred to; and

(2) Whether respondent has a right to prove its claim growing out of its contract of indemnity against the Receiver and to be paid dividends thereon as a common creditor out of the assets of the failed bank.

The Circuit Court held that the decree in the earlier case did not make the subject-matter of this action *res judicata*, and that respondent by reason of its indemnity agreement and payment on its bond is a creditor of the bank and entitled to have its claim allowed and to participate thereon in dividends from the assets of the bank.

The question here is whether the Circuit Court of Appeals erred in so holding.

BRIEF OF THE ARGUMENT.

I.

RES JUDICATA.

(a) The rule established by this court.

(b) The distinction between subrogation and indemnity.

(c) What was litigated and decided in the earlier action.

II.

THE RESPONDENT'S RIGHT TO INDEMNITY.

(a) Statement of the right.

(b) Cases supporting respondent.

(c) Cases relied upon by petitioners.

III.

REPLY TO OPPOSING ARGUMENTS:

(a) That the National under its contract is not entitled to participate in the assets of the bank in competition with Groesbeck and other general creditors before Groesbeck has been paid in full.

(b) That the allowance of dividends to the National would violate the principle of equality and ratable distribution established by the National Banking Act.

(c) That the court below erroneously applied the doctrine of relation back.

(d) That there is conflict in the two decisions of the circuit court of appeals involving the same subject-matter.

ARGUMENT.

I.

RES JUDICATA.

(a) The Rule Established by This Court.

The rule of law which must be followed in determining whether the subject-matter of this action was *res judicata,* by reason of the decree of the District Court of Utah (R. 107), as affirmed by the Circuit Court of Appeals for the Eighth Circuit, in the case of Salt Lake County, E. J. Groesbeck, Treasurer, and Amer-

ican Surety Co. vs. Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, Utah, Defendant, and vs. National Surety Co., American Indemnity Co., and Massachusetts Bonding and Surety Co., Interpleaded Defendants, 5 Fed. (2d) 34, was laid down by this Court in Cromwell vs. Sac County, 94 U. S. 351, 24 L. ed. 195, where it was said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

By way of explanation of the rule thus announced the court commented as follows:

> "Thus, for example: a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are

> concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever."

But that rule does not apply where the second action between the same parties is upon a different claim or demand, for the court said:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined." * * *
>
> "On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."

Shortly after the rule in Cromwell v. Sac County, *supra,* was announced, this Court again had occasion to review the doctrine of *res judicata.* In Davis v. Brown, 94 U. S. 423, 24 L. ed. 204, 207, the Court said:

"In taking this position, counsel have confounded the operation of a judgment upon the demand involved in the action, in which the judgment was rendered, with its operation as an estoppel in another action between the parties upon a different demand. So far as the demand involved in the action is concerned, the judgment has closed all controversy; its validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it; and that is all that the language means which is quoted by counsel from opinions in adjudged cases, in seeming consonance with his position."

"When a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action."

In Boise Development Company vs. Boise City, 30 Ida. 675, 167 Pac. 1032, the court said:

"When a party, acting upon a mistaken theory as to his legal rights, brings his action, and is defeated by reason thereof, and afterwards renews the litigation, basing his claim upon a correct theory, the former judgment is no bar to the second action. Black on Judgments, Sec. 733; Hughes v. United States, 4 Wall. 232, 18 L. ed. 303; Freeman on Judgments (4th Ed.) Sec. 260; 23 Cyc. 1226; Keane v. Pittsburg, etc., Co. 17 Idaho 179-191, 105 Pac. 60; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Lockett v. Lindsay, 1 Idaho 324. At most the former case was 'merely illusory and supposititious, and hence it cannot

> be considered as identical, in any just sense of the term, with the true cause of action correctly set up and supported by a right theory of the facts.' Black on Judgments, Sec. 733."

In Barnsdall v. Waltemeyer (C. C. A. 8), 142 Fed. 415, it was held that a suit to rescind a contract for misrepresentation and default of performance, which was dismissed on its merits, is no defense to an action to enforce the contract, the court saying:

> "But the fatuous choice of a fancied remedy that never existed, and its futile pursuit until the court adjudges that it never had existence is no defense to an action to enforce an actual remedy inconsistent with that first invoked through mistake."

The parties in the case at bar and in the earlier action are nominally the same, but it is clear that the claim or demand in this action is wholly different from that involved in the first action. Here the claim is based upon a contract of indemnity; there the claim was based upon the right of subrogation to dividends declared and to be declared upon a particular deposit. Here the action is at law to enforce a written contract; there the action was in equity to obtain the benefit of an equitable remedy. This distinction will be further noticed.

(b) The Distinction Between Subrogation and Indemnity.

The distinction between subrogation and indemnity goes to the very heart of this action and must be kept in mind throughout the consideration of the case, not alone on its merits, but as well on the question of *res*

judicata. "The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relation between the parties." *Memphis etc., R. R. Co., v. Dow et al.,* 120 U. S. 287, 30 L. ed. 595, 601. It is a device adopted or invented by equity to compel the ultimate discharge of a debt or obligation by him who in good conscience ought to pay it; it is the machinery by which the equity of one is worked out through the legal rights of another. *25 Ruling Case Law, 1312.* Indemnity, on the other hand, springs only from a contract express or implied (*In re Freeman & Co.,* 1 Fed. (2d) 430; *Northern Finance Co. v. Byrnes,* 5 Fed. (2d) 11) and may be defined as an obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit. *31 C. J. 419.*

The right of subrogation can be established only in a court of equity, the right of a surety who has paid the debt to subrogation standing, not upon contract, but upon the principles of natural justice. *Craythorne v. Swinbourne,* 14 Ves. Jr. 160; *Fishback v. Weaver,* 34 Ark. 569; *Memphis & L. R. R. Co. v. Dow,* 120 U. S. 287, 30 L. ed. 595; *Crisfield v. State,* 55 Md. 192; whereas, on payment of the principal debt, the surety becomes a simple contract creditor of the principal and is entitled to maintain the common-law action of *indebitatus assumpsit* for money laid out and expended. *Ward v. Henry,* 5 Conn. 595; 32 Cyc. p. 261.

A subrogee takes only such rights as belong to his predecessor in interest and takes them subject to all limitations, burdens and infirmities which attach to them in his predecessor's hands; while the rights of

the indemnitee are determined by the conditions and terms of his contract of indemnity.

> "It is competent for the principal and surety to enter into whatever express contract they will touching the reimbursement of the latter. The surety may contract for more than strict indemnity, or may bargain away his right to indemnity entirely, though stipulations claimed to have the latter effect will be strictly construed in his favor." Spencer on Suretyship, p. 159.

The surety's right to subrogation as against the debtor does not arise until and "unless he pays the whole debt or it is otherwise satisfied" (*United States vs. National Surety Co.*, 254 U. S. 73, 65 L. ed. 143; *Mellette Farmers Elevator Co. vs. H. Poehler Co.*, 18 Fed. (2d) 430, 431); whereas under a contract of indemnity the surety can proceed against the principal even though he has paid only a part of the debt.

> "If a surety pays anything on the debt, he is instantly vested with a right of action for his reimbursement against the principal, and if he pays all, he is subrogated to the creditor's position and securities." In re Kimbrough-Veasy Co., 292 Fed. 757.
>
> "Unlike the right or equity of subrogation, the right to indemnity becomes enforceable whenever the surety has paid any part of the debt for which he is liable." Spencer on Suretyship, p. 162.

It is to be noted that throughout this case the petitioners have wholly failed to take account of the basic distinction between subrogation and indemnity. They contend, because the court in the first case denied to respondent a prior right of subrogation to the divi-

dends to be paid to Groesbeck upon the deposit of the public funds of Salt Lake County, that such decision necessarily decided and concluded the rights of the respondent to receive dividends from the assets of the bank in its own right, based solely and directly upon the indemnity agreement executed by the bank to the respondent as the inducement and consideration for the execution of its depository bond. The denial in the earlier action of the respondent's right to be presently subrogated to dividends upon the County's deposit is not, of course, incompatible with the allowance in this action of its claim to indemnity; and the Circuit Court of Appeals so held.

Petitioner's confusion in failing to distinguish between subrogation and indemnity is well illustrated by the following extract from p. 53 of their supporting brief for a writ of certiorari in this case:

> "The limited rights which the National has in this case *spring from payment* * * *. The same reasons and the same motives have operated in the law to raise up and confer upon the surety the rights of indemnity and the rights of subrogation. Both rights are *conferred* upon the surety by *operation of law.* * * * A situation which has already *required the court to withhold subrogation must of necessity require it to withhold indemnity.*"

The courts themselves have not always been careful to distinguish between subrogation and indemnity, and some confusion and inapt expressions in the decisions have resulted from that fact. This situation was commented upon in Mellette Farmers Elevator Co. vs. H. Poehler Co., 18 Fed. (2d) 430, 431, where the court said:

"The reasons for the diversity of opinion arising out of situations such as this appear to be the failure to distinguish between an express or implied contract of indemnity and the right of subrogation, together with the desire to postpone the reimbursement of a paid surety until all obligees have been paid in full. However natural that desire may be, it should not be permitted to override well-established legal principles. If surety bonds are adequate to meet the needs of a situation, the obligees will be paid in full, and the surety left to reimburse itself from the assets of the principal so far as possible. Where such bonds are inadequate to meet a situation, there seems to be no logical reason for excluding a surety from participation, as a general creditor, after it has paid the full loss indemnified against. The cases which appear to support this conclusion are Title Guaranty & Surety Co. v. Shattuck (C. C. A.) 224 F. 401; Cole v. Myers, 100 Neb. 480, 160 N. W. 894; Am. Surety Co. of N. Y. v. Nat. Bank of Barnesville *et al.* (D. C.) 17 F. (2d) 942; U. S. F. & G. Co. v. Carnegie Trust Co., 177 App. Div. 176, 164 N. Y. S. 92; Id., 221 N. Y. 646, 117 N. E. 1086; In the Matter of Dailey & Ivins, Bankrupts, 19 Fed. (2d) 95; U. S. F. & G. Co. v. Centropolis Bank of Kansas City *et al.* (C. C. A.) 17 F. (2d) 913."

In Clark's Principles of Equity (1924) p. 605, it is said:

"Subrogation is, in most cases, rather an additional remedy than an additional right, and may exist concurrently with, and as a further security to, the right to a simple action for reimbursement or exoneration. The fact that a party entitled to reimbursement and also to subrogation is entitled to two distinct remedies, *seems often to be overlooked, to the confusion of both doctrines.*"

(c) What was Litigated and Decided in the Earlier Action.

The claim or demand in this case being clearly different from that in the earlier action, it remains to inquire just what was litigated and determined in the first case.

When the bank failed, January 17, 1922, Groesbeck, as Treasurer of Salt Lake County, had on deposit therein the sum of $643,094.29 (R. 67). To secure this deposit he had taken three depository bonds, one from the respondent in the sum of $125,000.00, one from the Fidelity & Deposit Company of Maryland in the sum of $75,000.00 (R. 67), and one from the Massachusetts Bonding & Insurance Company in the sum of $25,000.00. In addition he had accepted, as collateral, bonds of the Crystal Lake Farm Lands Company of the par value of $360,000.00. Each surety paid to Groesbeck and the County the amount of its depository bond. The American as surety on the official bond of Groesbeck had also paid the County $200,000.00, the penalty of its fidelity bond. These payments, added to the dividends paid by the Receiver, had reduced the unpaid balance of the County's deposit to $47,666.01. When the complaint in the original action was filed, the Receiver had on hand the sum of $56,809.42, apportioned as a further dividend on the County's deposit. This was $9,143.41 in excess of the amount needed to make the County whole, and the question arose as to whom this excess should be paid.

In this situation Salt Lake County, Groesbeck as its Treasurer, and the American, filed in the District Court of United States, for the District of Utah, on March 10, 1924, a complaint against the Receiver, in

which the facts as above outlined were set up and in which it was alleged:

> "That when said Salt Lake County has received said * * * $47,666.01 and thereby has been fully paid and made whole on account of the moneys so deposited in said National City Bank of Salt Lake City, Utah, the American Surety Company of New York will be entitled, by operation of law, to be *subrogated to the rights of the County and the County Treasurer, as against said National City Bank of Salt Lake City, Utah,* and its said Receiver, by reason of the County moneys deposited in said bank, and will be entitled to payment to it of *all moneys and dividends lawfully payable by said Receiver as dividends on account of said deposit until said American Surety Company of New York has been paid.*" (R. 76)

The complaint prayed that the Receiver be ordered to pay Salt Lake County and Groesbeck as Treasurer $47,666.01 of the dividend of $56,809.42 apportioned to the County's deposit in the said bank, and that the remainder of said dividend, $9,143.41, be paid to the American. (R. 77)

It was further prayed that "all further dividends accruing in the hands of the defendant *by reason of the deposit of County funds in said bank*" be paid to the American until it had been repaid in full for the losses sustained by it as surety upon the official bond of Groesbeck. (R. 77)

The complaint tendered no issue with reference to the bonds of the Crystal Lake Farm Lands Company which Groesbeck had held as collateral for the County's deposit. No decree was prayed with reference thereto (R. 77), although Exhibit A attached to the complaint and being an assignment to the American by Groes-

beck, with the approval of the County, of all rights of Groesbeck as Treasurer of the County against the bank, recited that:

> "And said E. J. Groesbeck as County Treasurer of Salt Lake County, and said Salt Lake County, do hereby assign, transfer and set over unto said American Surety Company of New York all its rights and claims in and to the $360,000.00 par value of the bonds of the Crystal Lake Farms Company held as security for the payment of said moneys represented by said deposit." (R. 79, 80).

The Receiver answered and admitted generally the allegations of the complaint. He alleged that upon the payment by the Fidelity & Deposit Company of Maryland of the penalty of its bond, in the sum of $75,000.00, he had, by reason of a special provision contained in said bond, set up a claim in favor of that company in the amount of $75,000.00 and had reduced the claim of the County to that extent, that is to say, from $643,-094.29 to $568,094.29. (R. 81) The Receiver admitted having in his possession for payment a dividend of 10 per cent declared on the County's remaining claim for $568,094.29, which dividend the Receiver claimed he was "ready and willing to pay over to *whomsoever is lawfully entitled thereto.*" (R. 82)

Because he did not know to whom this dividend should be paid and did not know to whom other dividends to be declared in the future on the deposit of Salt Lake County should be paid, the Receiver prayed the court for an order requiring the National and the Massachusetts Bonding & Insurance Company and the American Indemnity Company to interplead together "and set forth and litigate their rights among themselves *concerning said dividend of $56,809.42*" * * *,

and "any future dividends which may accrue and come into the possession of this defendant *by reason of the deposit by Salt Lake County of said funds* in the National City Bank." (R. 85)

It is thus seen that the complaint and the answer of the Receiver placed in issue only the right, after the County had been paid in full, to participate in dividends declared and to be declared *on the deposit of the County in the said bank.* This was *subrogation* to the rights of the County and did not in any way involve the rights of the National to reimbursement, growing out of its indemnity agreement.

The answer of the National, the respondent here, on interpleader, set out that it appeared:

> "In accordance with the order of interpleader made herein by the above-entitled court, requiring the National Surety Company to set forth *its rights to said sum of $56,809.42.*" (R. 87)

The answer of the National set out that:

> "By reason of its payment of said sum as aforesaid to Salt Lake County, it became by operation of law and is entitled to be *subrogated* to the amount of such payment *to the rights and claims of* Salt Lake County, and E. J. Groesbeck, its Treasurer, against the said National City Bank and this defendant as its Receiver. * * *" (R. 89)

and that the National is:

> "Entitled to subrogation in said amount ($125,000.00) as against the Receiver of its principal (the bank); and that the American Surety Company is entitled to subrogation and reimbursement only as against its principal (Groesbeck)." (R. 91)

It is true that the respondent, in its answer on interpleader, alleged that as a consideration for the issuance of its depository bond in the sum of $125,000.00, the bank had promised to indemnify and reimburse the National for any loss which it might sustain by reason of its execution of said bond, and that the National had "duly presented its claim in said amount arising out of said bond to the said defendant Receiver." (R. 92.)

The respondent prayed (Par. 2, p. 92) that it be—

> "Ordered, adjudged and decred that the National Surety Company is entitled by *subrogation* and operation of law to its pro rata share of said $9,143.41 of the *dividends now declared* and held by said defendant Receiver, together with its pro rata share of all dividends declared by the defendant Receiver *by reason of the deposit of said public funds in said bank*, together with its pro rata share of said Crystal Lake Farm Lands Company's bonds." (R. 92)

It further prayed that its claim against the Receiver in the sum of $125,000.00 arising out of the indemnity agreement be allowed and approved and the defendant Receiver ordered to pay dividends thereon; but the allegations of the pleadings and that part of the prayer relating to the indemnity agreement, apart from their relation to the right of subrogation, amounted to nothing more than a futile attempt to raise a new issue which could not be properly litigated and determined in that case. The National had been brought, on interpleader, into a suit in equity for the single purpose of setting up and litigating its right to be subrogated to dividends declared, or to be declared, on the deposit of public funds belonging to the County. Having been

brought in for this single purpose, it could not properly attempt to litigate an independent legal claim against the Receiver for reimbursement growing out of the bank's agreement to indemnify and reimburse it for such losses as it might sustain by reason of the execution of its bonds. The subject-matter of the suit was the right of subrogation to dividends on a particular deposit,—not the right of a claimant against the bank to participate as a common creditor in dividends generally. In a suit in equity for subrogation, the National attempted to litigate the subject-matter of a distinct, separate and independent action at law. This it could not do. Its allegations in that behalf had no proper place in its answer and were clearly subject to a motion to strike. The situation would be similar if the respondent had been interpleaded in a suit by Groesbeck and the County against the Receiver to quiet title to land and had attempted in its answer to set up as against the Receiver an action in its favor on a promissory note given by the bank. The attempt to litigate in the first case the respondent's right to indemnity was obnoxious to that provision of Equity Rule 37 reading as follows:

> "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

See Hutchinson v. Philadelphia & G. S. S. Co., 216 Fed. 795.

It was considerations such as these that led the Circuit Court of Appeals in this case to say that:

> "Such claim was not a proper subject for litigation in the former suit."

and that

> "Since it is a matter which could not properly have been litigated and was not actually litigated, and was not necessarily determined by the decree in the former suit, it is not concluded by that decree although it was put in issue by the pleadings." (R. 238)

It is doubtful whether this new matter was "put in issue by the pleadings" except in so far as this followed from the allegations in the answer of the respondent on interpleader to which reference has been made. The Receiver against whom alone these allegations were directed, and could properly be directed, made no reply to the answer in interpleader of the respondent. The American answered the respondent, but so far as the allegations in question are concerned merely stated as follows:

> "Answering paragraphs 12 and 13 of said complaint in intervention, this plaintiff alleges that it has no knowledge or information sufficient to form a belief as to the truthfulness of the allegations therein contained, and therefore and upon that ground denies the same." (R. 97)

It can hardly be said that this was sufficient to make an issue of the right of the respondent to dividends as a common creditor based upon its indemnity agreement.

But however that may be, the trial court in the first case apparently did not consider that the right of the respondent under its indemnity agreement was involved, for in its decree it said nothing whatever about it. It awarded $47,666.01 of the dividend then avail-

able to Salt Lake County, directed the payment of the balance, $9,143.41, to the American, and *subrogated* that company:

> "To all *dividends* that may become payable *on the claim in the sum of $568,094.29 of said Edward J. Groesbeck as Treasurer of Salt Lake County against said National City Bank,* and * * * to the bonds of Crystal Lake Lands Company of the par value of $360,000.00, held by said Edward J. Groesbeck *as collateral security for the deposit of said moneys in said National City Bank.* * * *" (R. 108)

It was further decreed that after the American had been paid in full, the National, the American Indemnity Company and the Massachusetts Bonding & Insurance Company—

> "Shall participate pro rata in all further dividends declared and payable on said claim and/or all balance of proceeds from the sale or other disposition of said Crystal Lake Farm Lands Company bonds, until the amount of the claims of said interpleaded defendants, as shown by their complaints in intervention, are paid in full, and any balance thereafter remaining shall belong to the Receiver of said National City Bank." (R. 109)

It thus appears that while the National was decreed to be entitled to subrogation, in its turn, to the claims of Salt Lake County and Groesbeck, its Treasurer, against the bank, nothing whatever was decided or decreed concerning its claim based upon the indemnity agreement.

Attorneys for the American admitted that they had prepared the decree as signed by the trial court (R.

171) and it seems evident that if they had believed that the right of the respondent to participate in dividends, by virtue of its indemnity agreement, was in anywise involved in the case, they would have proposed an appropriate provision in the decree to settle and determine such right. At the trial of the case it was stipulated and agreed that the County should be paid the remaining sum of $47,666.01 then due it (R. 68) and that, with the practical withdrawal of the County from further litigation in the case, the matter then resolved itself into a contest between the surety companies as to the merits of their respective claims to be subrogated to the rights of the County and of its Treasurer Groesbeck. (R. 68 *et seq.*) It follows that even though the right of respondent to indemnity was put in issue by the pleadings, as suggested by the Circuit Court of Appeals in this case (R. 238), it was proper for the trial court and the Circuit Court of Appeals in the first case to treat that issue as eliminated by this stipulation. That was clearly its effect and apparently its purpose; for Mr. Jensen, attorney for the American, stated:

> "This litigation as it now stands is purely litigation between the official bondsmen, the American Surety on the one side and the Massachusetts Bonding Company and the National Surety Company on the other." (R. 173)

This brought from the Court the question:

> "It is a contest between these bond companies as to priority?"

To which Mr. Jensen replied:

"That is the case, your Honor." (R. 174)

No effort was made by respondent to secure a separate judgment against the Receiver arising out of the indemnity agreement.

In its brief on that appeal the American said:

> "The National Surety Company now claims right of *subrogation* as to future dividends on E. J. Groesbeck's deposit and as to the Crystal Lake bonds, prior to the American Surety Company of New York, the assignee of E. J. Groesbeck and Salt Lake County, and in this case the National Surety Company is appealing *from a decree of the District Court holding that it was not entitled to such rights* until its obligee E. J. Groesbeck had been made whole." (R. 191)

> "The primary questions in this case are, therefore:

> First. Now that Salt Lake County has been paid in full, which surety company is entitled to priority as to dividends from the Receiver, *on E. J. Groesbeck's unpaid deposit, as County Treasurer with the bank?*

> Second. What are the rights of the two surety companies with respect to the $360,000.00 par value Crystal Lake bonds taken by E. J. Groesbeck as aforesaid and subsequently assigned to the American Surety Company of New York." (R. 191)

> "Appellant's counsel reminds us that as an *additional contractual fact* the National Surety Company had an agreement for indemnity with the National City Bank (Appellant's Brief 18 to 23 and

Tr. 87). *We deem this agreement wholly immaterial to the issues of this case but we refer to it here to get before the court all the alleged contractual relationships of the parties.*" (R. 192)

"As we understand them, the contentions of the National Surety Company are substantially as follows:

That the indemnity agreement of the bank, embodied in the bank's application to the National Surety Company for depository bond, gives the National Surety Company a direct legal right, *not to indemnity out of the general assets of the bank as such,* but to indemnity out of *the dividends declared and payable upon the claim of Mr. Groesbeck.* * * *" (R. 192).

"The contention that the National has a legal right, through the bank's promise of indemnity, to *take its indemnity out of the dividends payable on the Treasurer's claim,* is another way of saying that the National by contract with the bank, to which the Treasurer was not a party, acquired a right *against the Treasurer to take or share in his dividends.*" (R. 192)

From these statements it appears that the American regarded the National's claim under its indemnity agreement, in so far as it figured in the first action, as merely an attempt on the part of the National to assert, by virtue of that agreement, some sort of superior right of *subrogation* to the claims of the County and its Treasurer against the bank. In its brief before the Circuit Court of Appeals in the first case, the American said further:

"It is very clear from the foregoing case, and clear upon principle, that the indemnity agreement between the bank and the National must be

treated as a separate contractual arrangement affecting only the National and the bank." (R. 192)

"We submit that both upon principle, as a plain matter of contract, and upon the authority of the case above mentioned, there is nothing in the National's so-called indemnity agreement with the bank that gives it any standing or any rights in the present litigation." (R. 193)

"It follows, therefore, that the National, neither through its creditor, the Treasurer, nor through its principal, the bank, has acquired any rights and that under neither rule is it entitled to subrogation. *The National is claiming rights of subrogation under facts and circumstances where no such rights can arise.*" (R. 193)

The Circuit Court of Appeals in the first case adopted the view so strenuously urged by the American and, in its own opinion, held that:

"These cases involve the question of appellant's right to share by way of *subrogation,* in certain dividends in the hands of one Jenkins, and accruing from assets, which came into the hands of Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah * * * as also the right of appellants to participate in the proceeds of certain securities in the hands of one Groesbeck." (R. 110)

"The single question is whether, upon the facts stated, the law and the equities give these remaining dividends and the proceeds of the Crystal Lake Farm bonds, *after the County has been paid in full,* to the appellant National Surety Company or to the appellee American Surety Company." (R. 112)

"The rule applicable to this situation seems to be fairly well settled. The rule is that 'the right

of *subrogation* cannot be enforced until the whole debt is paid.' " (R. 114)

"The confusion in the case at bar arises from a mistaken view as to the identity of the actual creditor of the bank, as also the identity of the company, the money of which in part made this creditor whole * * *. The rule deducible from the cases is, that until the creditor is paid in full, no right of *subrogation* exists in favor of sureties who paid a part of the debt. In short, the creditor may insist on getting his full pound of flesh before others are allowed to sit at the banquet board." (R. 114)

Following the decision of the Circuit Court of Appeals in the first case, the National applied to this Court for a writ of certiorari. The American filed a reply to said application and expressed its opposition in a brief wherein it used language, shown by the Record in this case, as follows:

"But the Circuit Court of Appeals held, not this, but that the County was not upon all views the creditor of the Bank, as the National insisted, notwithstanding that the money deposited in the Bank was in some aspects there as a trust fund; that in such view as was necessary to determine the rights of subrogation though of course not necessarily upon all views, the Treasurer was the debtor of the County and the Bank the debtor of the Treasurer, not the County." (R. 209)

"Instead of having departed from this rule, the Circuit Court of Appeals in the instant case, as indicated in the quotation above from the opinion, itself decides that the Treasurer, in such view as is necessary to determine the question of *subrogation,* is the debtor of the County and the Bank the debtor of the Treasurer." (R. 209)

> "Cases are numerous holding, under language similar to that in the National's bond, that such a bond stands back of the entire deposit, not simply such part thereof as is equal to the penalty, and therefore holding that there is no *subrogation* until the whole debt has been paid." (R. 209, 210)

> "*The case involves merely a private dispute as to subrogation between surety companies.*" (R. 210)

As already noted, although the respondent on interpleader in the earlier action had set up its indemnity agreement and had asserted its right to participate in dividends based thereon, no issue was joined between the Receiver and respondent on that matter. Moreover the Receiver filed no brief nor took any part in the appeal. In the present case, however, we find the Receiver contesting vigorously the right of respondent to recover upon its indemnity agreement. The reason is obvious. The right in question is involved in this action but was not involved, and the Receiver did not consider that it was involved, in the earlier action.

The Circuit Court of Appeals upon this view of the case, affirmed the trial court in its decree in the first case awarding *subrogation* and said nothing whatever about the right of the respondent, growing out of its indemnity agreement. Based upon the record as thus made, the Circuit Court of Appeals in the present case, in passing upon the question of whether the subject-matter of the action was *res judicata* by reason of the decision in the subrogation suit, was able to say (R. 234) with entire correctness:

> "At the commencement of the trial a stipulation was entered into between counsel by which it was agreed that the balance due Salt Lake County

should be paid out of the fund, and an order was entered directing that such payment be made. Counsel for the American Company and the County thereupon announced that the litigation as it then stood was wholly between the American Company on the one side, and the Massachusetts Company and the National Company on the other side, as to which was entitled to the prior right of *subrogation* to the balance of the second dividend, to the future dividends to be paid on the deposit of Groesbeck, as Treasurer, and to the Crystal Lake bonds. *That was the sole issue tried by the court and determined and adjudicated by its decree.* That was the sole issue considered by this court on the appeal of the cause. See National Surety Co. v. Salt Lake County, 5 F. (2d) 34, where District Judge Faris, speaking for the court, said:"

The court here cites the extracts from the opinion in the subrogation case, which we have quoted above, and continues:

"The first question presented is whether the decree in the former suit is a bar, under the doctrine of *res adjudicata,* to the claim and right which the National Company now asserts. In their complaint in the former suit, the American Company and Groesbeck asserted and claimed that the American Company was *subrogated* to the rights of Groesbeck, as Treasurer, and of Salt Lake County in the excess of the second dividend, in the future dividends, and in the Crystal Lake bonds. The order of interpleader brought the National Company in *solely for the purpose of determining whether it or the American Company had the prior right of subrogation* to those specific funds and bonds. When the cause came on for hearing, counsel for the American Company and the County announced that the sole question to be

determined was whether the American Company or the National Company and the Massachusetts Company were entitled to the prior right of *subrogation.* While the indemnity agreement of the National Company was pleaded and introduced in evidence, it was upon the theory that it gave a superior equity to the National Company, and because thereof, a prior right of subrogation."

The court here cites in part the extracts from the brief of the American Company which we have quoted above. It then says:

"It is clear that the parties, the trial court, and the appellate court, were of the opinion in the former suit *that the National Company's direct claim against the bank on its contract of indemnity and the right to dividends thereon were not there involved.* The prior right of *subrogation* to the dividends on the claim of the county and to the proceeds of the Crystal Lake bonds was the sole issue litigated, the sole question determined by the decree, and the sole question passed upon by this court on appeal. The right of the National Company, because of its contract of indemnity, to participate in the dividends payable on the deposit of Groesbeck as Treasurer was denied, but the right of the *National* Company to *participate in dividends* as a general creditor *upon the contract of indemnity* was neither considered nor determined.

The cause of action asserted by the National Company in the former suit was predicated upon its alleged right of *subrogation.* The cause of action sought to be enforced by the National Company in this case is predicated upon its *contract of indemnity.* It is a cause of action which is wholly independent of, and entirely separate and distinct from the alleged cause of action asserted

by the National Company in the former suit. Since the National Company seeks relief in the instant case upon a different and distinct cause of action from the one asserted by it in the former suit, the judgment in the former suit is conclusive only as to such points or questions as were actually in issue and adjudicated therein." (Citing authorities.)

"It is true that the National Company, in its answer in the former suit, alleged the contract of indemnity, and prayed that its claim thereon against the receiver be allowed and approved. But such claim was not a proper subject for litigation in the former suit. *It was the subject of an independent suit by the National Company against the receiver.* The American Company so contended in its brief on appeal in the former suit. Since it is a matter which could not properly have been litigated, and was not actually litigated, and was not necessarily determined by the decree, in the former suit, it is not concluded by that decree although it was put in issue by the pleadings." (Citing authorities.)

It follows that the claim sued upon in this case was not *res judicata* by reason of the decision in the first case, and that the said claim must be determined on its merits.

II.

THE RESPONDENT'S RIGHT TO INDEMNITY.

(a) Statement of the Right.

Entirely separate and distinct from and in no manner dependent upon or related to rights by subrogation is the right of a surety who pays the debt of his principal in whole or in part to be reimbursed by such

principal. And if the principal be insolvent, this right of the surety to indemnity makes him, as a creditor of his insolvent principal, a general claimant against his estate with the right to file a claim and to be paid dividends thereon in common with other general creditors. Some phases of this subject have already been referred to in our discussion of the distinction between subrogation and indemnity. The legal basis and some of the incidents of this right to indemnity were so well and forcibly stated by the Circuit Court of Appeals in U. S. F. & G. Co. vs. Centropolis Bank, 17 Fed. (2d) 913, that we here quote somewhat fully from that case:

> "It is well settled that when a contract of suretyship is made there arises, in the absence of an express agreement, an implied contract that the principal will indemnify the surety for any payment the latter may make to the creditor in compliance with the contract of suretyship. This implied contract arises when the suretyship is made, and not when the payment is made by the surety thereunder. The relation of debtor and creditor exists between the principal and surety from the time the contract of suretyship is made. The payment relates back to the time when the contract was entered into by which the liability to pay was incurred, fixes the amount of damages for which the principal is liable to the surety and matures the cause of action therefor. Rice v. Southgate, 16 Gray, 82 Mass. 142; Griffin v. Long, 96 Ark. 268, 131 S. W. 672; In re Stout (D. C.), 109 Fed. 794; Smith v. Young, 173 Ala. 190, 55 So. 425; Hatfield v. Merod, 82 Ill. 113; Berry v. Ewing, 91 Mo. 395, 3 S. W. 877; Martin v. Ellerbe's Admr., 70 Ala. 326, 335; Poe v. Dixon, 60 Oh. St. 124, 54 N. E. 86, 88; Loughridge v. Bowland, 52 Miss. 546; Bragg v. Patterson, 85 Ala. 233, 4 So. 716, 717; Barth v. Graf, 101 Wisc. 27, 76 N. W. 1100, 1103; Nally v. Long, 56 Md. 567; M. Kahn & Bros. v. Bledsoe, 22 Okla. 666, 98 Pac. 921.

In Rice v. Southgate, *supra*, the court said:

'Upon well settled principles, it is clear that the contract of a principal with his surety to indemnify him for any payment which the latter may make to the creditor in consequence of the liability assumed takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied contract or promise of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages for which the principal is liable under his original agreement to indemnify the surety. Gibbs v. Bryant, 1 Pick. 121. Appleton v. Bascom, 3 Met. 169.'

In Griffin v. Long, *supra*, the court said:

'The true rule seems to be that the surety becomes a creditor of the principal at the time he signs the note as surety, and not at the time he pays the same.'

In Smith v. Young, *supra*, the court said:

'Although a surety cannot maintain an action against his pricipal on the liability created by the suretyship, until such surety has paid the debt or a part thereof, it is because the right of action does not come into existence until such payment, and not because the relation of debtor and creditor did not theretofore exist. The same thing is true as to the creditor or payee of a note signed by the principal and surety. The payee cannot sue the principal or the surety until the note is due, yet the relation of debtor and creditor certainly exists from the making of the note.'

In M. Kahn & Bros. v. Bledsoe, *supra,* the court said:

'It has been repeatedly held by the courts that a surety is a creditor of his bankrupt principal, and that he is such creditor before default and from the date of signing the note.'

A fortiori such results must follow where an express contract of indemnity is made.

The contract of indemnity created the relation of debtor and creditor between the bank and the Surety Company from the date the contract of suretyship was executed and delivered to Jackson County. The payment made by the Surety Company related back to the date of the contract of indemnity, fixed the amount of damages for which the bank was liable to the Surety Company and matured the latter's cause of action on the contract of indemnity.

It follows that the Surety Company became a creditor of the bank on May 19, 1923, when the county depository bond was executed and delivered; that the Surety Company was a creditor of the bank when the bank became insolvent, closed its doors and went into the hands of the Deputy Commissioner of Finance for the purpose of liquidation on November 14, 1924; that upon the payment by the Surety Company of the penalty of the bond on May 7, 1925, a cause of action accrued in its favor against the bank which had its inception in the contract of indemnity and which related back to the date of the contract of suretyship made May 19, 1923,"

In Mellette Farmers Elevator Co. v. H. Poehler Co., 18 Fed. (2d) 430, 431, the court said:

"When a contract of suretyship is made, there arises, in the absence of an express agreement,

an implied contract, that the principal will indemnify the surety for any payment it may be required to make under the contract of suretyship. This implied agreement comes to life when a contract of suretyship is made; from that time on the relation of debtor and creditor exists between the principal and surety. The payment of the money under the contract by the surety merely fixes the amount of damages for which the principal is liable, and relates back to the time the contract was entered into."

In Stearns on Suretyship (3rd Ed.) Sec. 279 it is said:

"If the promisor in a suretyship pays the debt of the principal in whole or in part, he is entitled to recover the amount paid from the debtor. If the principal makes no express promise to indemnify the one who engages to answer for his debtor default, the law will imply a promise. * * * From the time of the very earliest cases there has been a general acquiescence in the rule that a payment by a surety or guarantor for the account of their principal is presumed to be at the request of the latter, which raises an implied promise of reimbursement, upon which an action at law will lie."

See also:

1 Brandt on Suretyship (3rd Ed.) Sec. 226.
Newman v. Goza, 2 La. Ann. 643, 645.
Ritenour v. Matthews, 42 Ind. 7, 14.

As pointed out by the Court of Appeals in the instant case the National was the creditor of the bank from the date of the indemnity agreement by reason of having loaned the bank its credit.

> "One who loans his credit to another is as much his creditor as one who loans his money to him. A creditor is 'one who has the right to require the fulfillment of an obligation or contract. Bouv. Law Dict. p. 435.'" Schwartz vs. Siegal, 117 Fed. 13, 17.

No new contract was made when the National paid the penalty of its bond. The payment merely fixed the amount of damages for which the bank was liable under its indemnity agreement. Payment by the National matured and fixed the amount of the debt and gave rise to a right of action at law for reimbursement. This debt owing by the bank to the National was entirely new and distinct. It was in no sense the debt, or any part of the debt, which the bank originally owed Groesbeck and the County. Being a separate and distinct claim and a valid and binding obligation of the bank it should have been allowed by the Receiver and dividends paid thereon.

Townsend v. Sullivan, 3 Cal. App. 115, 84 Pac. 435, where it is said:

> "Where the administratrix of a surety paid the principal's debt in order to relieve the surety's estate from liability, an entirely new and distinct debt, due from the principal to the surety's estate was created, and the principal became liable to the estate for the full sum paid by the administratrix with interest at the legal rate."

Yndo v. Rivas, 107 Tex. 408, 142 S. W. 920, Id. 180 S. W. 96, where it is said:

> "When a surety pays a debt for his principal, the surety's claim for reimbursement is not on the original debt, but on an implied promise arising out of the relation of the parties."

Hill et al v. Wright, 23 Ark. 530, 532, where it is said:

> "But the obligation of principals to reimburse to sureties the money paid by them, is not founded on the bonds which sureties give for their principals, but on the express contracts of indemnity which the parties make, or upon the implied promise raised by the law upon the payment of money for another at his request."

In Ryland v. Commercial, etc., Bank, 127 Cal. 526, 59 Pac. 989, a surety paid the note of a corporation and later brought an action against a stockholder to enforce his statutory liability. At the time of bringing this action the liability of the corporation on the note was barred by the statute of limitations. The court held:

> "The law implied an agreement on their part to indemnify the surety whenever he paid the obligation and this implied agreement was distinct from their liability to the payee. The right of action upon the libility arising out of this implied agreement accrued upon payment by the surety, and not before."

The contract of indemnity which the bank entered into with the respondent was not in contravention of any provision of law or of the public policy of the State of Utah, nor was it in contravention of any act of Congress relating to the conduct of national banks. It was therefore a legal and enforceable contract and no contention is made to the contrary. *National Surety Company vs. Blaumauer* (C. C. A. 9), 247 Fed. 937; *Western Surety Company vs. Kelly*, 27 S. D. 465, 131 N. W. 808; *U. S. F. & G. Co. vs. Centropolis Bank of Kansas City*, 17 Fed. (2d) 913; 31 C. J. 424 Sec. 16.

The depository bond executed by the respondent, and in which Groesbeck as Treasurer of Salt Lake County was obligee, detracted nothing from the force or scope of the indemnity agreement. There is nothing in the bond which indicates any agreement as between the bank, the respondent and Groesbeck that the claim of the County upon its contract of deposit should be given any priority over the claim of the Surety Company upon its contract. This being true, there is no reason in law or in equity why the contract of indemnity upon which this action is based should not be enforced.

(b) Cases Supporting Respondent's Claim.

The decision of the Court of Appeals in the case at bar was based largely upon its own decision in the case of U. S. F. & G. Co. vs. Centropolis Bank of Kansas City, 17 Fed. (2d) 913, from which we have already quoted at some length. Other cases supporting the view for which we centend are:

U. S. F. & G. Co. vs. Carnegie Trust Co., 177 App. Div. 176, 164 N. Y. S. 92, Id., 221 N. Y. 646, 117 N. E. 1086;
American Surety Co. vs. National Bank of Barnesville, 17 Fed. (2d) 942;
In re Daily, et al., 19 Fed. (2d) 95;
Mellette Farmers Elevator Co. vs. H. Poehler Co., 18 Fed. (2d) 430;
United States F. & G. Co. vs. McClintock, et al., (D. C. District of Wyoming, not officially reported), decided 9-2-27.
Title Guaranty & Surety Co., vs. Shattuck, et al., 224 Fed. 401.
Tennant vs. U. S. Fidelity & Guaranty Co., et al., 17 Fed. (2d) 38.

In U. S. F. & G. Co. vs. Carnegie Trust Company, *supra,* while the surety's right to *pro tanto* subrogation was denied, the entire deposit for which it was surety not having been paid, the court said:

> "It does not follow, however, because the surety cannot be subrogated to the claims of the bankrupt's creditors that it has no claim for the monies paid on the surety bond. The Carnegie Trust Company gave its indemnity agreement covenanting to make good to the surety company any monies which that company should be compelled to pay under its bond. The surety company thus has become the creditor of the Carnegie Trust Company to the extent of the required payment, and its right to its dividend cannot be impaired by the fact that the claim arises upon a payment of a deficiency upon another debt of the Carnegie Company which has already had its full dividends. To hold otherwise would hold nugatory the indemnity agreement. The surety's holding that one debt of a bankrupt cannot create two liabilities against the surety apply only where the creditor is thus seeking an undue proportion of the assets of the bankrupt. No such result can be here reached, and the surety's claim here arises, as any other claim might arise, out of a contract which itself contemplates the possible inability of the debtor to pay a certain debt in full."

In American Surety Company vs. National Bank of Barnesville, et al., 17 Fed. (2d) 942, after quoting authorities in support of the general rule that 'a surety liable only for a part of a debt does not become subrogated to collateral, or to remedies available to the creditor, unless he pays the whole debt or it is otherwise satisfied," the court said:

> "The written application, signed by the bank through its officers, accepted by the surety com-

pany, evidenced by the issuance of the surety bond thereon, constituted a contract of indemnity, limited to the terms of indemnity expressed therein. The relationship of debtor and creditor between the bank and surety company was created on the acceptance of the application by the surety company. Liability dated from that moment. The question of the amount of the liability became a determinable factor only after default upon the bond of the bank and the payment of the surety liability by the surety company.

At the time the surety company presented its claim to the receiver for allowance, it had a right of action on its indemnity contract. Title Guaranty & Surety Company vs. Hannon and others (C. C. A.) 265 Fed. 116. If there are no other reasons, outside of what is presumptively shown by the record in this case, why this right of action of the surety company could not be developed into a judgment, or some other reason why the surety company should be put to suit to establish its right of action, it would seem that the receiver erroneously rejected the surety company's claim. If this apparent right of action were transformed into a judgment, no reason is discernible why, in that form, it would not be a claim of an unsecured nature against the bank, and that the surety company would be a creditor on a parity with other unsecured creditors.

So far as the prayer of the bill prays for an order directing the receiver to accept the complainant's claim by reason of the right of subrogation, the same is denied; the defendant receiver will deduct from the claim of the defendant Board of Education, filed and allowed by him, the sum of $6,000.00 (the amount paid by the surety company) and will recover from the defendant Board of Education all sums paid to it as dividends upon the said amount of $6,000.00, and this cause is continued for a period of thirty days for such further proceedings as may be desirable in the premises."

At the bottom of page 30 of the brief of petitioners an attempt is made to discredit this case by the following comment:

> "Here then we have the anomalous situation of a court deciding that the surety could not enjoy rights by way of subrogation as a matter of law and then proceeding as a matter of fact to allow and direct that it be given such rights."

Of course, it is obvious that however the court may have erred, if it did err, in applying the remedy, its purpose was to allow the surety company to participate in dividends on the basis of its indemnity agreement. The force of the decision as a precedent is, therefore, in nowise weakened.

In re Daily, et al., 19 Fed. (2d) 95, Daily and Ivins were under contract with the City of New York, secured by a bond. The contractors defaulted and the bond was paid. There was in that case, as in this, an indemnity agreement and the surety company proved its claim and sought to recover as against the bankrupt estate. The court said:

> "The learned Referee took the view that the indemnity agreement of the American Surety Company did not create any other rights than those of subrogation, so far forth as the estate of the bankrupt partnership was concerned, and disallowed the claim, taking the view that the only rights of the surety were by subrogation under section 57-I of the Bankruptcy Act (Comp. St. Sec. 9461), and in support of his position relied upon the case of Williams vs. Fidelity Insurance & Guaranty Company, 236 U. S. 549, 59 L. ed. 713. Since the contract of the parties gave the American Surety Company larger rights than

> those of subrogation and indemnity, it would seem that, so far as the surety company's contract was breached (and there is no dispute about that), it is entitled under the contract to damages which it has proved in the sum of $90,000.00, and may prove the same against all estates."

This case was reviewed by the Circuit Court of Appeals for the Third Circuit in Tennant v. U. S. Fidelity & Guaranty Co., et al., 17 Fed. (2d) 38. The decision of the trial court was affirmed and its opinion adopted as the opinion of the Circuit Court of Appeals.

In Mellette Farmers Elevator Company vs. H. Poehler Company, 18 Fed. (2d) 430, 431, the court said:

> "Applying these rules to this case, it is obvious that the Fidelity & Deposit Company of Maryland on the 8th day of June, 1921, when it executed and delivered the bond here involved, became a creditor of the H. Poehler Company, principal on the bond; that upon the payment of the judgment rendered against it for the full amount for which it could be liable under the bond, it became entitled to reimbursement under the implied contract of indemnity. Up to the time of the payment of the amount of the bond, it was in the position of a creditor having an unliquidated claim. It now has a liquidated claim antedating the receivership."

In U. S. Fidelity & Guaranty Company vs. McClintock, et al., (District of Wyoming, not officially reported), the court after reviewing the case of U. S. Fidelity & Guaranty Company vs. Centropolis Bank, 17 Fed. (2d) 913, and the decision of the Circuit Court of Appeals in the instant case, 18 Fed. (2d) 707, held:

"In the absence of any discoverable distinguishing features between those cases and the case at bar, the holding of this court must be that the depository surety is entitled to have its claim allowed by the receiver for the full amount of its payment upon its indemnifying bond and to participate with the general creditors in all unpaid and future dividends."

In Title Guaranty & Surety Co. v. Shattuck, et al., 224 Fed. 401, the court said:

"It (the surety) had never undertaken to pay all the debts of the Product Company; the promise was to pay them up to the limit of the penal sum, and, having discharged that obligation, it was bound no further to those creditors either legally or equitably. The position of counsel is based on the evident assumption that the surety company is still under some obligation to those creditors, and therefore cannot be allowed to share in the fund until the creditors themselves have been paid in full."

(c) Cases Relied Upon by Petitioners.

In opposition to the cases supporting the respondent's view petitioners rely upon certain cases to which reference will be made. Among these is a case in the Fourth Circuit Court of Appeals,—Maryland Casualty Company vs. Fouts, 11 Fed. (2) 71. In that case the surety company having made payment of the amount of its bond, $50,000.00, and while a balance of $39,000.00 of the deposit of the State Treasurer remained unpaid, claimed, as stated by the court:

"(1) That when it paid to the State Treasurer of North Carolina $50,000.00, it was entitled to

> prove its claim for that sum; (2) that it was subrogated by reason of the payment of $50,000.00 to the claim of the State Treasurer of North Carolina to that amount against the bank and its assets; (3) that it was entitled to dividends as any other creditor of the bank upon the $50,000.00."

It is clear from the opinion in this case that the court based its decision wholly on the claimed right of *subrogation.* Apparently the court treated the contention of the surety that it was entitled to dividends as any other creditor of the bank, as not involved in the case, or, if involved, that it was covered by the prayer for equitable subrogation, for the court said (p. 73):

> "The appellant, plaintiff in the District Court, is asking equitable relief, in that it may be, by way of subrogation, placed in the position of one whose indebtedness it has paid under an indemnity bond executed by it to the bank of Salisbury to cover an indebtedness of that bank to the State."

It very properly decided that until the state had been paid in full the surety had no right by subrogation, and then added, without discussion and apparently without consideration of the asserted right "to dividends as any other creditor," "*or otherwise.*" These two words "or otherwise" are all that petitioners can find in the Fouts case upon which to base the contention that the case is an authority against the right under contract for which the respondent is here contending. It requires an active imagination, to say the least, so to construe that case. The Fouts case can hardly, therefore, be considered as a deci-

sion *contra* to those of the Circuit Court of Appeals of the Eighth Circuit in U. S. Fidelity & Guaranty Co. vs. Centropolis Bank of Kansas City, 17 Fed. (2d) 913 and in the case at bar. If it is to be regarded as such a decision, it was repudiated in Judge Phillip's opinion in the Centropolis case, for he said:

> "This conclusion has not been reached without a careful consideration of the opinion of the Fourth Circuit in the case of Maryland Casualty Company vs. Fouts, *supra*."

Another case strongly, but unjustifiably, relied upon by petitioners is Zimmerman (Commission of Banking) vs. Chelsea Saving Bank, 161 Mich. 691, 125 N. W. 424. In proceedings to liquidate the assets of the bank in that case the American Surety Company was permitted to file a petition in intervention and the receiver was ordered to answer it. The surety company had written a depository bond in the sum of $50,000.00 based upon an indemnity agreement similar to that involved in this case. It contended, as stated in the opinion of the court, that the State as a sovereign was entitled to priority of payment as against other creditors of the bank, and that if it had exercised such right the surety would have been absolved from payment, or, if it had paid, would have found itself in position to be fully reimbursed. It asserted its right to stand in the place of the State and demand priority of payment because the State, as it contended, might have demanded it.

It further contended that it was entitled, upon paying the penalty of its bond, to be subrogated, *pro tanto*, to the right of the State against the bank, notwithstanding the fact that the debt of the bank to the State

had not been fully paid; that where there is a bond to secure a floating balance which may exceed the amount of the bond, the surety is entitled to have the dividends pro rated to the whole debt, so that it might have the benefit of that part applicable to its payment or to have it applied in reduction of the penalty of its bond; and that the surety under the indemnity agreement was entitled "to stand as a creditor of the bank and receive its share of any dividends paid."

It is very doubtful, to say the least, that the claim of the surety company in that case "to stand as a creditor of the bank and receive its share of any dividends paid," was, in any sense, an issue in the case, except in so far as subrogation in some form to the rights of the State against the bank was involved. This appears from the court's summary of the position taken by the receiver in opposition to the claims of the surety. It said:

> "On behalf of the receiver it is asserted, first, that a surety is not entitled to subrogation upon payment of a part of the debt; second, that the debt, in this case, is a whole amount due from the bank to the State; third, that the bond given by the intervenor affords protection to the State for any ultimate balance arising out of the dealings between the State and the bank as a depository of the State moneys; fourth, that the State is not entitled to priority."

It thus appears that no clear issue was made in that case as to the right of a surety to stand as a creditor of the bank by virtue alone of its indemnity agreement and payment of its bond; and it appears probable that it was in no sense an issue as the case went to the Supreme Court. This point is not noticed

in the decision of the Supreme Court, and that decision cannot, therefore, be accepted as an authority against the allowance of the right which the respondent is now seeking to enforce.

Petitioners cite other cases in which the decisions had to do entirely with the right of subrogation; but subrogation is not here involved directly nor indirectly. They emphasize language found in the opinions in such cases to the effect that the undertaking of the surety must be construed as security for the whole debt, and that it is not entitled to participate in dividends until the whole debt has been discharged. In the light of their particular facts, these cases amount to nothing more than a restatement of the well established rule that a surety, liable only for a part of the debt, cannot be subrogated to the rights of his obligee until the latter's debt has been paid in full. Such cases have no authority as precedents in the construction of the law governing the right of a surety under an indemnity agreement.

III.

REPLY TO OPPOSING ARGUMENTS:

(a) That the National Under Its Contract is Not Entitled to Participate in the Assets of the Bank in Competition With Groesbeck and Other General Creditors, Before Groesbeck Has Been Paid in Full.

In support of their general contention that it would be inequitable to permit respondent under its contract of indemnity to receive dividends from the assets of the bank until Groesbeck and the surety on his official bond, the American, have been paid in full, petitioners say:

"To allow the National to recover anything on its indemnity agreement until Groesbeck has been made whole is to violate the plain terms of the National's guaranty to him and to reduce its liability as guarantor of his entire deposit, a liability which continued 'as well after as before' the payment of the penalty of its bond." (Petitioners' Brief top p. 11.)

*"The National's bond stands not behind any particular part of Groesbeck's deposit, but behind all of it so as to be a guarantee against ultimate loss—a guarantee of the last $125,000.00, or any part of it. * * * The authorities clearly establish that it was his right to receive dividends upon his deposit from the Receiver as long as dividends were available, and then to call upon the National for the residue of his debt or deposit up to the full penalty of its bond."* (Petitioners' Brief p. 12.)

"If we read the decisions correctly, the National's contract is not simply an agreement to pay the penalty of the bond. It is also a guarantee of Groesbeck's entire deposit. The latter obligation and the legal liability in connection therewith continued as well after as before the National paid the penalty of its bond." (Petitioners' Brief p. 27.)

These arguments are not sound. The National's liability was limited to the penalty of its bond. When it paid this penalty, its bond was exonerated. It no longer continued liable as a guarantor of the entire deposit, nor did its liability continue "as well after as before" payment, except in the sense that until the deposit, which it guaranteed in part, was paid in full the surety could assert no claim to be subrogated to the rights of the Treasurer against the bank, or to any collateral which he may have held.

This contention was answered by the Circuit Court of Appeals in the Centropolis Bank case, *supra*, as follows:

> "We think that a construction of the bond in the instant case in accordance with above rule compels the conclusion that it was the intention of all of the parties to the contract that the Surety Company should be liable to the county for all of the principal of the county's deposit, together with interest thereon, up to and including, but not exceeding, the sum of $50,000, and that the recital in the bond that the penal sum thereof is $50,000, just as effectually limits the language of the condition as if there had been written into the language of the condition itself the words 'up to and including but not exceeding $50,000.' It is true that the liability under the bond was not limited to any particular portion of the whole deposit. In that sense, the bond was security for the whole deposit, and for that reason the right of subrogation does not exist, but the maximum amount for which the Surety Company could be held liable thereunder was expressly fixed at $50,000. The Surety Company has discharged that liability by payment in full. The county has received all that it contracted for from the Surety Company. How then can the county say that the spirit of the guaranty will be violated? We find nothing in the language of the bond which justifies the contention that the claim of the county upon its contract of deposit should be given any priority over the claim of the Surety Company upon its contract."

In the case of Leggett v. Humphreys, 21 How. 66, 16 L. ed. 50, 54, this Court said:

> "Sureties are never held responsible beyond the clear and absolute terms and meaning of their

> undertakings. Presumptions or equities are never allowed to enlarge or in any degree to change their legal obligations * * *. The undertaking of the surety is essentially a pledge to make good the misfeasance or nonfeasance of his principal to an extent coextensive with the penalty of his bond."

In this connection it should be noted that the bank specified in its application for the National's bond that $125,000.00 was the

> "Maximum amount of deposit bond is required to secure." (Par. 4, R. 58.)

Petitioners further contend that:

> "*As long as Groesbeck is unpaid to the extent of $1.00, the National, by the terms of its bond, is required to stand back and withhold interference with any of the securities to which Groesbeck might resort; otherwise the National does not lose the $125,000.00 as it has agreed, and just to the extent to which it minimizes its loss at the expense of Groesbeck it is relieved from the obligation of its contract.*" (Petitioners' Brief p. 12.)

To contend that the National *agreed to lose $125,000.00* is to indulge in loose thinking. It made no such agreement. It agreed to pay the Treasurer $125,000.00 or so much thereof as might be necessary to make up its deposit with the bank. That was the extent of its agreement, but prudently it took such measures as seemed necessary to protect itself against loss in the event the bank became insolvent. That was its right. It cannot however, be subrogated to the rights of Groesbeck against the bank or to stand in his place with reference to the collection of

dividends to be paid *on the County's deposit* until the Treasurer has been paid in full in accordance with the "familiar rule of the law of subrogation under which a surety liable only for part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied." *United States vs. National Surety Co.*, 254 U. S. 73, 76.

The contract of indemnity provided:

> "That all declarations and answers made in the foregoing application are true, and that the same are made for the purpose of inducing the Company to execute the bond applied *for without demanding collateral security from the depository.*" (R. 10) * * *

It thus appears that the National took the indemnity agreement in place of collateral security, which it might legally have demanded from the bank.

Let us suppose that the National had required collateral security and that the bank had given it sufficient to fully protect it against loss. This fact would not have made necessary any change whatever in the language of the depository bond. Under such circumstances there could be no doubt of the National's right to retain and to realize on its collateral, and it might very well have happened that the National, on the failure of the bank, would have been the only creditor who was in position to realize dollar for dollar on its claim and escape without loss. Under these circumstances, what becomes of the argument of petitioners that the respondent *agreed to lose $125,000?* Its utter fallacy is thus completely demonstrated.

The petitioners contend also that:

*"The National cannot by virtue of an independent agreement with the bank, to which Groesbeck was a stranger, assert rights to any moneys by way of dividends paid by the Receiver, until Groesbeck has been paid in full and until the obligation of the National's bond which stands behind his entire debt or deposit has been fully performed. * * * The fundamental difficulty which confronts the National in seeking to have its indemnity claim allowed and dividends paid thereon, is that it comes before the court with an outstanding contract of indemnity and guaranty to Groesbeck as yet unperformed and without prospect of full performance."* (Petitioners' Brief p. 11.)

*"If, on the other hand, the bond was, as the Circuit Court previously held, security for the whole deposit so as to prevent subrogation, then that guaranty in the National's bond likewise bars it as a matter of contract from receiving anything by virtue of its indemnity agreement until Groesbeck's debt has been paid in full * * *. Can it be possible that the National, seeking relief by subrogation, can be successfully confronted by the barrier of its outstanding and unperformed guaranty of Groesbeck's whole deposit, and that it can then pursue indemnity and avoid this same contractual barrier? Why should the contractual ground not be as effective and complete an obstacle to its recovery in the one case as in the other?"* (Petitioners' Brief p. 29.)

We see no difficulty whatever in holding that the National may enforce a claim against the bank springing from contract, notwithstanding the fact that it is not entitled to immediate subrogation to the rights of its obligee against the bank. If the contract was in all respects legal and valid, and its *enforcement not limited or restrained*, why should it not be enforced? Can any good reason be found for destroying

a right acquired by one surety through contract in order that the benefits expected by another surety from subrogation might be perhaps increased?

Petitioners urge the following questions:

> *"Suppose Groesbeck had never received anything from the National on account of its bond but had received all the dividends from the bank that the Receiver could pay? Suppose the dividends received had amounted to 60 per cent of his claim and he was still unpaid to the amount of $125,000.00. Suppose he then made demand upon the National for the payment of the penalty of its bond. Would the National then be required to pay Groesbeck the full penalty of its bond according to its terms, or would it be entitled to withhold 60 per cent and pay only $50,000.00? * * * Can it be, therefore, that by paying the penalty of its bond early, the National can so improve its situation as to change its legal rights and recoup itself to the extent of approximately $75,000.00, one-third of it at Groesbeck's expense."*
> (Petitioners' Brief, 20, 21.)

The time of payment could not change the National's legal rights under its contract, but the time of payment and of the maturing of its right of action might very materially affect its chances of recovery. That is a fact of common experience in all commercial transactions.

It might very well happen in the supposed case, if the respondent had slept on its rights in the premises and had taken no steps looking to the protection of its interests in the event of being called upon later to make payment under its bond, and if the assets of the bank were exhausted before recourse was had to the sureties, that the respondent might have had to

pay the full penalty of its bond only to find itself unable to recoup its losses either through subrogation or indemnity. This fact would affect the value of its rights but not their character.

Even though it be conceded that the value of respondent's right in this case may have been affected by the diligence of Groesbeck in seeking payment on the National's depository bond, that fact cannot operate to destroy the right itself or even to change its character. This would merely be a fact in the case which could not change the law applicable thereto.

Was it inequitable (1) to Groesbeck or to the surety on his official bond or (2) to the general creditors of the bank, other than the respondent, to allow the respondent's claim on its indemnity agreement? These questions will be separately answered.

(1) It was not inequitable to Groesbeck nor to his official surety for several reasons. When Groesbeck made his deposit of County moneys he accepted as security in addition to the bond written by the National in the sum of $125,000.00, a bond written by the Fidelity & Deposit Company in the sum of $75,000.00, and one by the Massachusetts Bonding & Insurance Company in the sum of $25,000.00. To cover the balance of his deposit, amounting to $418,094.29, he accepted, as collateral, bonds of the Crystal Lake Farms Company amounting in par value to $360,000.00, and a personal bond executed by the directors of the bank which was intended to cover excess deposits. The Fidelity & Deposit Company had inserted a provision in its bond to the effect that upon payment thereunder it should be immediately subrogated to the rights of Groesbeck against the bank to the extent of its payment, and it was so subrogated without contest. This

was contractual and not equitable subrogation. It must be assumed that Groesbeck knew it was the custom of surety companies to protect themselves in that or some other manner. He himself had been obliged to give an indemnity agreement to secure his official bond. (R. 125-131.) For all he knew the respondent may have required the bank to put up collateral to protect it in whole or in part in the event it were required to pay the penalty of its bond. This would have been entirely lawful and within the proper authority of the bank. If the respondent had taken collateral, there could be no question later as to its right to realize on such collateral for its own protection, and Groesbeck would have been in no position to complain had it done so. But the argument which would deny the National the right to participate in dividends on the debt resulting from its indemnity agreement would, if sound, be equally potent to deny it the right to realize on its collateral security until Groesbeck had been made whole. Such, however, is not the law. If the National had taken collateral to secure it, it might well be that it would have been protected in full, but instead of this it took an indemnity agreement from the bank, under which it cannot now expect complete reimbursement. It is thus shown that securing the credit of the National through the giving of an indemnity agreement was a clear benefit rather than a detriment to Groesbeck, for the collateral, in place of which the indemnity agreement stood, was left in the bank to be converted into cash and distributed as dividends, a considerable percentage of which was paid to Groesbeck on the total of his large claim.

If the Treasurer now complains that he did not know of the indemnity agreement, the answer is that

he can no more complain of that fact than he can of the fact that he did not know what the other obligations of the bank were that would result in claims on which dividends would have to be allowed and paid. In the case of Merrill v. National Bank, 173 U. S. 131, 146, 43 L. ed. 640, 646, this Court said, that, as among the claimants to the assets of the bank, equality between them was equity, and then added:

> "But that was not inconsistent with the common law rule awarding to diligence, prior to insolvency its appropriate reward; *or with conceding the validity of prior contract rights.*" (Italics supplied.)

The bank was under no obligation to advise Groesbeck as to the manner in which it had secured the depository bond, whether by putting up collateral or the making of an indemnity agreement; nor can it be said that that duty rested upon the respondent. Any duty which existed in the matter was the duty of the Treasurer to take such steps as were necessary for the protection of his trust.

In this connection, it is proper to observe that if Groesbeck had taken adequate security for the County's deposit, that is to say, if he had taken surety bonds covering the entire amount, he would not now be complaining, or in position to complain, that he himself had not been paid in full. It was his duty under Sec. 4500 Compiled Laws of Utah, 1917, to take adequate security for the County's funds. Instead of doing this he took as such security bonds of the Crystal Lake Farms Company in the sum of $360,000.00. These constituted a non-liquid, frozen asset and this was known at the time the bonds were accepted. When these bonds were sold by the American Surety Com-

pany, they brought only $90,000.00 (R. 253, 255). This is some evidence at least that when accepted by Groesbeck they were worth much less than par value. Concerning these bonds the Receiver testified: "The Crystal Lake Farm Company bonds of the par value of $360,000 have no practical value at this time." (R. 70) The loss which Groesbeck will sustain, if any, is thus directly traceable to his own negligence in the acceptance of collateral of doubtful value. In the final analysis it could not be unjust or inequitable if some resulting loss should fall upon him who was primarily and directly responsible for failure to take adequate security for the deposit of the County funds. But no such loss will result as we later show.

(2) Nor can it be said that to allow the respondent's claim on its indemnity agreement would be inequitable to other general creditors of the bank.

In the first place it is to be observed that the transaction between the bank and Groesbeck was authorized by law and was solely for the purpose of securing a desirable deposit for the bank. It did not increase the liabilities of the bank for it had an asset in the deposit to offset the liability to Groesbeck. But the money in question being public funds, the Utah Statute required security for its repayment. Groesbeck deposited the County's money in the bank on the strength of the security received,—collateral and surety bonds. By repayment of the deposit the bank could have received the return of its collateral and the cancellation of the bonds. If the bank had taken its very best collateral, such as Government or other bonds of unquestioned stability and value, to the amount of the deposit, and had placed these with Groesbeck as security for the repayment of the Coun-

ty's funds, the transaction would have amounted to nothing more than an exchange of securities for cash. Neither the bank nor any of its creditors could be adversely affected by this transaction.

Now let us suppose that Groesbeck instead of taking this collateral and being forced to realize thereon in the event of the bank's failure, had preferred to take, as security, depository bonds written by reliable companies; and that, to indemnify these companies the bank, instead of putting up this collateral with Groesbeck, had put it up with the sureties writing the depository bonds. The situation would remain unchanged except that the transaction would have become tri-lateral rather than bi-lateral. In exchange for its securities the bank would still have the cash. In the event of failure the sureties would be under obligation to make good Groesbeck's deposit and, having done so, they could look to their securities, as well as subrogation to the rights of Groesbeck against the bank, in order to make themselves whole. *Merrill v. National Bank*, 173 U. S. 131, 43 L. ed. 640. The other creditors would be in no position to complain if the transaction had been handled in this manner.

But, going a step further, let us suppose that instead of putting up bonds or other collateral to indemnify the sureties loaning their credit to the bank, the bank had been able to secure this credit by merely giving indemnity agreements such as that which forms the basis of the present action. This would not be a detriment to the bank or its creditors. On the other hand it would be a distinct benefit for under this arrangement the bank would have the deposit and would, at the same time, retain the collaterals in its possession. Among other advantages this arrangement might well result in increased profits being earned for the bank,

but, at the very least, the collaterals would remain among the assets of the bank and, upon its failure, would, to the extent of their value, increase the funds in the hands of the receiver for distribution as dividends. And when the surety has paid the amount of its depository bond, how could there be anything unfair to other general creditors in allowing it to *draw dividends on its claim,* springing from the indemnity agreement and payment thereunder, *and thus recover only a part of its loss,* if there is nothing unfair in allowing it to hold and realize on *collaterals which it might have taken sufficient in value to give it complete protection?* The argument that the allowance of respondent's claim would be unfair or inequitable to Groesbeck or to other general creditors of the bank thus falls to the ground. The further argument that such allowance would establish a preference in favor of the County's deposit, in violation of the National Banking Act, is discussed under the next subhead of this brief.

Groesbeck and the American Have Been or Will Be Paid in Full.

Strong appeals for sympathy occur in the Petition for Certiorari and in Petitioner's Brief of which the following is typical:

> "*Groesbeck's deposit has not been repaid and there is no prospect that either he or his assignee or subrogee, the American Surety Company, will ever be repaid or made whole by many thousands of dollars if the present decision of the Circuit Court of Appeals stands and if the National Surety Company is thereby allowed to compete with Groesbeck and his assignee in the enjoyment of dividends from the bank's assets.*" (Petition for Certiorari, p. 4.)

We do not concede that considerations such as these can properly be allowed to affect, in any manner, the right asserted by the respondent in this case; and we notice them only because we think they give a wrong impression of existing facts. The receiver testified that, up to the date of filing his answer in this case, he had paid creditors "sixty per cent of the face of their claims" (R. 70). The claim of the County, originally $643,094.29, was decreased $75,000 when the Fidelity & Deposit Company was subrogated to its rights in that amount. Its outstanding certificate is, therefore, in the sum of $568,094.29. Payments made by the sureties have already been stated and we now know (R. 253, 255; Petitioners' Brief, p. 2) that $90,000 were realized from the Crystal Lake Farm Company bonds. We are thus enabled to make the following tabulation of payments already made to the County and/or to Groesbeck and the American on account of the County's deposit.

Received from:

Fidelity and Deposit Company, as surety for the bank	$75,000.00
National Surety Company, as surety for the bank	125,000.00
Massachusetts Bonding Company, as surety for the bank	25,000.00
American Surety Company, as surety for Groesbeck	200,000.00
Receiver, in dividends 60% on $568,094.29	340,856.57
Proceeds of Crystal Lake Farm bonds	90,000.00
TOTAL	$855,856.57

Of these payments the County received only the face of its original claim, $643,094.29. This sum deducted

from the total payments, $855,856.67, leaves a remainder of $212,752.26. This represents the sum repaid to the American by the Receiver. The American repaid the County only $200,000 of its deposit, and the American has already received $12,752.26 in excess of that amount.

"But," it will be said, "the American was, by the decree in the first case, awarded interest on the principal sum of $200,000.00 from the 29th day of February, 1924, until paid." That is true. It was also awarded $23,362.15 without interest. The American resisted payment to the County and suit was brought against it in the State courts. The County obtained judgment which was affirmed by the Supreme Court of Utah. The American was required to pay the sum of $23,362.15 as interest and costs.

The justice and propriety of requiring the receiver to repay the American this $23,362.15 and interest on the principal sum of $200,000 until paid, may well be questioned. This $23,362.15 was not applied in reduction of the County's claim against the bank. Neither the bank nor the Receiver received any benefit from it and we can see no reason why the Receiver should have been required to repay it to the American. The allowance of interest appears to us to place the American in a preferred status as compared with other general creditors of the bank. It may well be, however, that these allowances are not open to attack in this proceeding. But even so, the record shows that Groesbeck and the American will receive all that the decree in the first case gave them, including interest.

The Receiver testified that he expected to be able to pay a further dividend of fifteen per cent (R. 70) on the present recognized claims amounting to $1,583,-

926.88. If this expected dividend is realized, a simple calculation will show that Groesbeck and the American will receive all that they are entitled to under the decree in the first case with the National participating in the dividends.

Petitioners contend:

(b) That the Allowance of Dividends to the National Would Violate the Principle of Equality and Ratable Distribution Established by the National Banking Act.

In petitioners' brief at the top of page 38 the statement is made that:

> "The National Banking Act (R. S. 5236, Sec. 194, New U. S. Code Ann.) requires that dividends to creditors of the bank shall be ratable and without preference,"

and they add that the decision of the Circuit Court of Appeals in this case

> "establishes a preference in favor of Groesbeck's deposit to the detriment of other depositors of the bank and violates the intention of Congress as expressed in the National Banking Act."

To illustrate the point they thus made, the petitioners assume what they refer to as a simple case. They say:

> "Assume ten individuals constitute all the depositors in a bank upon its failure and that each of the ten has ten thousand dollars upon deposit. One would naturally assume under such a state of facts that each of the ten depositors would share equally in and receive one-tenth of the dividends paid by the Receiver." (Petitioners' Brief, p. 39.)

Petitioners' assumption could be true only if we make the additional assumption that the bank has no liabilities except to its depositors. Such an assumption would be a violent one. Dividends are not paid by an insolvent bank to its depositors alone, but are paid to all who can establish that they were creditors of the bank prior to insolvency. It matters not whether one becomes a creditor of a bank by depositing money therein, or by loaning it money on its notes or other form of obligation, or by furnishing it with services or supplies of any kind whatever. Likewise it matters not if one becomes a creditor of a bank by loaning its credit on the basis of an indemnity agreement and bond, as in the case at bar.

All creditors of the bank, and not merely the depositors, are to be considered. The National Banking Act requires, it is true, that dividends shall be distributed ratably and without preference, but this does not mean that all creditors shall ultimately realize the same percentage of their claims. A creditor who has taken collateral or other security may recover in full, whereas one who has neither may suffer a complete loss. If one of the supposed depositors in the sum of $10,000.00 owes a note of $10,000.00 to the bank he can set off the note against the deposit and in this way recover dollar for dollar, although other depositors may receive not more than ten cents on the dollar. All these things may occur without violation of the National Banking Act. All that this Act requires is that the dividends distributed by the receiver shall be ratable and that nothing be done after insolvency which amounts to an attempt to give a preference to one creditor over others—such as the giving of security when the officers of the bank know it is insolvent

and will not reopen. *Ball vs. German Bank*, 187 Fed. 750 (certiorari denied, 225 U. S. 709, 56 L. ed. 1267).

However, even if we assume, in the case supposed by petitioners, that the bank has no obligations not connected with or related to its deposits, it would still be impossible to assume that it has only ten creditors; for, the moment it entered into an indemnity agreement to reimburse the surety on its depository bond, it would have added the surety to its list of creditors, and, when insolvency supervened, its creditors would be the ten depositors and the surety on the depository bond, whose credit had been loaned to the bank in order to secure the deposit of the public funds,—not ten, but eleven.

The argument of petitioners is that since, under the rule announced by this Court in Merrill vs. Bank, *supra*, the secured depositor continues to draw dividends on his entire deposit until he is made whole; if the surety is also allowed to draw dividends on its indemnity claim, the secured creditor and the surety, in the supposed case, would be drawing together dividends on $15,000.00, while each of the other supposed depositors would be limited to dividends on $10,000.00. But this argument overlooks the fact that the secured depositor was a creditor of the bank in the sum of $10,000.00 and is entitled, under the rule in Merrill v. Bank, supra, to draw dividends on the whole debt until he is paid in full; while the surety, by virtue of its contract of indemnity, was a creditor of the bank in an amount which has become fixed by payment in the sum of $5,000.00. The bank's obligation to pay the secured depositor dividends on the face of his deposit until he has been paid in full, and its obligation to reimburse the surety for that part of the bank's debt

which the surety has paid, are entirely separate and distinct. These obligations originated when the bank was solvent. They were incurred as an incident in the transaction of its business. They were legal and valid and involved no preference when created. They could then not become illegal and invalid nor could they work a preference in performance. As said by this court in Merrill vs. Bank, supra, performance of these obligations amounted to no more than "conceding the validity of prior contract rights."

The only thing which could defer the right of the surety to indemnity, until the secured creditor is paid in full, would be some provision in the bond intended to produce that result; but there is no such provision in the bond written by the respondent in this case. In the Centropolis Bank case, *supra,* which was, for all practical purposes, identical with the present case on its facts, and upon which the Circuit Court of Appeals based its decision on the merits in this case, the statement was made:

> "We find nothing in the language of the bond which justifies the contention that the claim of the County upon its contract of deposit should be given any priority over the claim of the Surety Company upon its contract." 17 Fed. (2d) p. 913.

We have already pointed out that the contractual obligation of the bank to reimburse and indemnify the respondent was a new obligation, entirely separate and distinct from the obligation of the bank to repay Groesbeck his deposit of the County's funds. The payment of dividends on both claims at one and the same time could not, therefore, constitute a double payment on either. Failure to recognize this essential distinction is responsible for the confusion, shown by the

trial court in its handling of this case and by the petitioners from the inception of the case to the present.

The point here involved was considered in United States Fidelity & Guaranty Co. vs. McClintock, *et al* (District of Wyoming, decided September 2, 1927, not officially reported), and the court there held:

> "Again the depository surety maintains that it is entitled to be allowed by the Receiver its claim upon its indemnity agreement in the amounts of $25,000.00 paid by it to the County and to receive dividends upon such claim along with the general creditors. This the official sureties admit and consent to, but the Receiver objects, contending that the allowance of the claim of the County for the full amount of the deposit and the allowance of the claim of the depository surety will represent the payment of double dividends from the assets of the bank in derogation of the rights of the other depositors, because of the fact that the only deposit in the bank on a par with other depositors was that of the County, and that the depository surety did not become a creditor until after the bank had closed and had made its payment on its bond. * * * While there seems to be some merit in the contention of the Receiver that such an allowance would represent double dividends in comparison with and affecting the rights of the general creditors of the bank, yet it may be distinguishable and allowable because it is actually a distinct and separate obligation from the obligation of the bank to pay over the funds in its hands to the County Treasurer. Had the bank closed temporarily but during the interim of being closed the depository surety had paid the amount of its bond to assist in making good the County deposit and the bank had afterwards opened and the County received its money in full as a depositor, it could not be contended that the bank was not obligated to pay the surety under its agreement

to indemnify the surety against loss. While the deposit of the County and the bond securing its payment in a sense appear one and the same transaction covering only the deposit of the County, yet the two obligations are distinct in that they grow out of two separate and distinct express or implied contracts. If, for example, instead of having given a bond to secure the County funds, it seemed to be necessary for the bank, for the security of those funds, by contract to increase the capacity or strength of its vaults and the contractor for such work had not been paid at the time the bank closed, could it be contended that the contractor for such work was not entitled to participate with the general depositors of the bank in dividends upon his claim for services thus performed? And yet in that case the obligation of the bank would have arisen out of the transaction involved in the deposit of the County's money in the bank."

The court held further that in addition to being entitled to draw dividends under its indemnity agreement as a general creditor of the bank, the surety was also entitled to be subrogated, the official deposit having been paid in full, to the rights of the County against the bank, and to draw dividends as such subrogee. In this connection the court said:

"Counsel have made a diligent search for authorities upon this point, but have found nothing which is convincing to the court. My view is that the two positions in which the depository surety finds itself are entirely separate and distinct. In one it is a straight creditor of the bank by virtue of the indemnity agreement, in the other it assisted in discharging the debt and making the County whole by virtue of which, the debt having been paid in full, it becomes subrogated in equitable proportions to the rights of the County. The relationship of the two rights are as distinct as

though they were held by different individuals and should be here so regarded. The surety companies of course can participate to no greater extent than to make themselves whole for the sums which they have paid."

Petitioners contend:

(c) That the Court Below Erroneously Applied the Doctrine of Relation Back.

The petitioners say that it would be inequitable to apply the doctrine of relation back in favor of the National because—

"(1) *The National has contributed nothing to the assets of the bank.*

(2) *The National's payment to Groesbeck has not reduced the outstanding claims against the bank, nor has it resulted in any benefit to any depositor except Groesbeck. It is therefore inequitable to permit the National to become a creditor along with general depositors as of the date of the bank's failure.*

(3) *As against Groesbeck it is inequitable and illegal for the National to enjoy dividends at his expense, because it violates the promise of the National contained in its bond.*" (Petitioners' Brief, p. 37.)

They also argue that—

"Any rights which the National has against the Receiver arise from the contract between the National and the bank and to that agreement Groesbeck was not a party. As to that agreement Groesbeck is a third person who has acquired lawful rights against both parties thereto.

> The bank, as principal, and the National as surety, agreed to protect Groesbeck from loss. We contend the doctrine of relation back cannot be applied in favor of the National so as to deprive Groesbeck, an innocent third person, of the rights he has acquired against the National and the bank." (Petitioners' Brief, p. 33.)

Most of these arguments have already been sufficiently noticed. The argument that the National has contributed nothing to the assets of the bank is, of course, fallacious. In this connection petitioners say:

> "If the penalty of the National's bond had been paid to the bank or its Receiver instead of to Groesbeck, the National would be in the same position as others who put money in the bank. Or, if the National's payment to Groesbeck had extinguished the claim of Groesbeck so that the bank's assets were relieved of his claim to the benefit of general depositors, then the National's position might be different." (Petitioners' Brief p. 36-7.)

What difference can it make that instead of paying its $125,000.00 to the bank the respondent paid that amount to Groesbeck for the bank? To all intents and purposes, at least so far as Groesbeck is concerned, it contributed that much to the assets of the bank. The National's payment to Groesbeck reduced the outstanding sum which the bank was obligated to pay Groesbeck by $125,000.00; although the sum on which Groesbeck continues to draw dividends remains without diminution until he is paid in full.

In support of their contentions as above set out, petitioners cite the case of United States Fidelity & Guaranty Co. vs. Wooldridge, 268 U. S. 234, 69 L. ed.

932. The facts in that case, however, are in nowise comparable with the facts in the case at bar. In that case the surety had written a bond guaranteeing the deposit of a railroad company in the bank. It had also written an official bond for the president of the bank. The bank failed through default of the president. The surety company paid on its depository bond the sum of $23,312.51 to the railroad company and was subrogated to the rights of the company against the bank. When suit was brought on the official bond for $25,000.00, the surety company attempted to set off its claim, as subrogee of the railroad company against the bank, against the bank's demand on the official bond of the president. The court held that the two bonds were "wholly independent transactions" and were not brought into mutual account by any agreement of the parties. It assumed for the purposes of the argument that upon the payment to the railroad company, the subrogation of the surety company to its rights related back to the date of its contract, but it held that because the two transactions were wholly independent and not brought into mutual account by any agreement of the parties, there could be no set-off of one against the other.

The case of Springfield National Bank vs. American Surety Co., 7 Fed. (2d) 44, also cited by petitioners, followed the Wooldridge case and made clear the point we have just made that the decision in the Wooldridge case did not turn upon the fact that the doctrine of relation back could not be applied, but on the fact that set-off could not be allowed because there was no mutuality of accounts; the court saying:

> "The two bonds were separate transactions, totally lacking in contact. When other equities

> are involved the right of set-off ordinarily depends on mutual credits which have been defined as 'an existing debt due to one party, and a credit by the other party, founded on, and trusting to such debt, as a means of discharging it.' Scott v. Armstrong, 146 U. S. 499, 13 S. Ct. 148, 37 L. ed. 1059."

To the same effect is the case of Fidelity & Deposit Co. v. Robinson, 7 Fed. (2d) 371, also cited by petitioners. They also cite the case of Johnson v. Jones, 1 Black. 209, 17 L. ed. 117, where an attempt was made to have a deed related back to the date of a title bond. Because of the peculiar facts of that case it cannot be cited as any authority for the decision of the case at bar.

So far as the doctrine of relation back in this case is concerned, the sole question is as to when the relation of debtor and creditor as between the bank and the respondent was created. On this point the authorities are overwhelmingly in favor of the holding of the Circuit Court of Appeals in the Centropolis Bank case, 17 Fed. (2d) 913 that "the relation of debtor and creditor exists between the principal and surety from the time the contract of suretyship is made."

Petitioners contend:

(d) That There is Conflict in the Two Decisions of the Circuit Court of Appeals Involving the Same Subject Matter.

The petitioners contend that there is conflict between the decision of the Circuit Court of Appeals in the case at bar and in the first case, and that both decisions cannot be given full force and effect. In this connection they say:

> "We contend that the first decree denied the National the right to participate in the funds in the hands of the Receiver until Groesbeck and the American were wholly paid, while the present decision of the Circuit Court authorizes the National to compete with Groesbeck and the American in the enjoyment of the same fund." (Petitioners' Brief, p. 41.)

This is another illustration of the failure of petitioners to distinguish between subrogation and indemnity. The first decision merely held that the respondent could not be subrogated to the rights of Groesbeck against the bank until Groesbeck and the American were fully paid. It decided nothing with reference to the indemnity claim which is the subject of this action. On the other hand the decision of the Circuit Court in this action determines the rights of the respondent under its claim for indemnity, and decides nothing with reference to its rights of subrogation.

Petitioners claim that there is a second ground of conflict in that the decision in this case is "opposed to fundamental principles of suretyship law" which were recognized in the decision in the first case. They state the principle which they believe the decision in this case violates by quoting from Cyc as follows:

> "The surety has no rights superior to those of the principal and cannot enforce a lien which the latter could not have enforced."
>
> "The surety cannot be placed in a more favorable position than the principal." (Vol. 37, p. 429)

It seems obvious that this rule of law, though sound in cases to which it applies, can have no application where the surety has, to the extent of its obligation, paid the principal's debt and is asserting rights of re-

covery *against* the principal. The right of subrogation and the right of indemnity are both rights which the surety, in a proper case can assert against the principal. They are neither weakened nor destroyed by the fact that the principal cannot assert them against himself; nor can they be measured or controlled by any right which the principal may or may not assert in its own behalf. This alleged ground of conflict has no real existence. The two decisions are clear and distinct and not in conflict at any point.

CONCLUSION.

We believe we have demonstrated that the subject matter of this action was not *res judicata* by reason of the decision in the first case and that the respondent is asserting here a right which it is entitled to have recognized and enforced. The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 424.—October Term, 1927.

Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah; E. J. Groesbeck, Treasurer of Salt Lake County, Utah, et al., Petitioners,
vs.
National Surety Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 14, 1928.]

Mr. Justice Stone delivered the opinion of the Court.

The petitioner Jenkins was appointed receiver of the National City Bank of Salt Lake City, an insolvent national bank, by the Comptroller of the Currency, under the provisions of § 5234, R. S. The respondent National Surety Co. brought this action against the receiver to compel the allowance of and payment of dividends on its claim upon an indemnity agreement executed by the bank. The agreement was contained in the bank's application for a bond by which the bank as principal and the respondent company as surety undertook that the official deposits of the treasurer of Salt Lake County, Utah, up to a named sum, would be repaid on demand. The deposits at the time of the insolvency exceeded the amount of the bond. The district court directed that dividends on the claim for indemnity be postponed until the county treasurer should have been repaid the full balance of his deposit. The court of appeals for the eighth circuit reversed the decree with instructions that the respondent be paid dividends on an equal basis with other creditors, including the treasurer. *National Surety Co.* v. *Jenkins*, 18 Fed. (2d) 707. This Court granted certiorari, 275 U. S. —, to remove a conflict alleged to exist between the decision below and rulings by the courts of appeals in other circuits. *Maryland Casualty Co.* v. *Fouts*, 11 Fed. (2d) 71, *Springfield National Bank* v. *American Surety Co.*, 7 Fed. (2d) 44.

In his answer the receiver prayed that Groesbeck, the county treasurer, and the American Surety Co. be required to interplead.

An order issued and they filed a joint answer, from which it appeared that Groesbeck, as principal, and the American Surety Company, as surety, had given to Salt Lake County an official fidelity bond in the sum of $200,000. The treasurer deposited the county funds in his custody in the bank and took as security the respondent's bond in the sum of $125,000, bonds of other surety companies, executed to him as obligee, in the total sum of $100,000, and from the bank a certain amount of apparently doubtful collateral.

When the bank failed his official deposit amounted to $643,094.29. Salt Lake County was paid in full — $200,000 by the American Surety Co. as surety of the treasurer's fidelity bond; $125,000 by the respondent National Surety Co., the balance by the other surety companies and by dividends paid by the receiver. When the second dividend was paid it was sufficient to pay the final balance due from the treasurer to the county and leave a surplus of over $9,000; but there remained an unpaid balance of the deposit due from the bank to the treasurer.

The claim of the respondent company is for its pro rata share of this surplus and of all dividends paid or to be paid by the receiver as well as of the collateral given to the treasurer by the bank. The claim is resisted by the interpleaded petitioners, the treasurer and the American Surety Co., on two grounds, first, that the right of the treasurer and his surety to full repayment of his deposits before any dividends are paid the respondent is in this case *res judicata;* second, that the respondent is not entitled to share in the estate of the insolvent debtor until the balance of the creditors' claims have been fully satisfied. On both grounds the circuit court of appeals ruled against the petitioners.

The plea of *res judicata* was based on the decree in an earlier suit brought in the district court by the county treasurer and the American Surety Co. against the receiver to determine their right to the excess of the second dividend over the county's claim, to all future dividends and to the collateral. The National Surety Co., the respondent here, was interpleaded and answered. A decree in favor of the American Surety Co. was affirmed by the court of appeals for the eighth circuit. *National Surety Co.* v. *Salt Lake County,* 5 F. (2d) 34. We think the court below was right in holding that the earlier litigation had determined only that the National Surety Co. was not entitled to be subrogated to the treas-

urer's claim and remedies against the insolvent bank until he had been paid in full, and in no way involved the National Surety Company's present separate claim on its contract of indemnity, and that the plea of *res adjudicata* was consequently ineffective. But as the certiorari was granted to review the other branch of the case, and as the view we take of it makes unnecessary an extensive consideration of the first question, we pass at once to the second.

The right now asserted by the respondent arises, not from subrogation to the rights of the treasurer but upon its independent agreement with the bank for indemnity. The bank's undertaking was to indemnify respondent for liability which it might "sustain or incur" by reason of its having given its surety bond, which was conditioned on the bank's keeping its deposits "subject at all times to the check and order of the treasurer." So long as the bank remained solvent respondent would have been entitled to immediate indemnity from the bank even though that payment neither satisfied the treasurer's claim nor exhausted the surety's own liability. *Davies* v. *Humphreys*, 6 M. & W. 153; *Ex parte Snowden*, 17 Ch. D. 44. As between itself and its principal the surety should not have been required to make any payment at all, and to allow it prompt reimbursement would in no way impede the creditor so long as the principal remained solvent. But if, as here, the principal is insolvent, any dividends paid the surety on its claim for indemnity before the creditor's whole claim has been satisfied would decrease the creditor's dividends by his proportionate share of the payments to the surety. They would also result in a species of double proof, detrimental to the principal's other creditors, for the secured creditor would, under the applicable "chancery rule," still be entitled to dividends on his entire original claim. Compare *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131.

Respondent, in insisting on the letter of its agreement, takes a position in effect inconsistent with the obligation it undertook to secure to the treasurer the repayment of his deposits to the extent of $125,000. If after paying that amount to the treasurer it may then compete with him in the distribution of the insolvent's assets, the benefit of the surety bond to the treasurer is diminished *pro tanto*. By the expedient of taking a separate indemnity agreement from the debtor the surety would be enabled to deprive the creditor of the full benefit of the security he had demanded.

The established rule that the surety may not claim subrogation against an insolvent debtor until the creditor is paid in full is a

recognition of the inconsistency of that position. *United States* v. *National Surety Co.*, 254 U. S. 73, 76; *Peoples* v. *Peoples Bros.*, 254 Fed. 489; *United States Fidelity & Guaranty Co.* v. *Union Bank & Trust Co.*, 228 Fed. 448, 455. The rule would go for naught if, by claiming indemnity instead of subrogation, the surety could achieve the same result. The same policy against permitting a surety to compete with the creditor for the insolvent debtor's assets requires that the surety be denied subrogation to security given to a creditor for several debts for only one of which the surety is obligated. *National Bank of Commerce* v. *Rockefeller*, 174 Fed. 22. Similar reasoning underlies the requirement of equity that the surety who holds the security of an insolvent debtor must give the benefit of it to the creditor for whom he is surety, until the debt is fully paid. See *Keller* v. *Ashton*, 133 U. S. 610; *Hampton* v. *Phipps*, 108 U. S. 260; *Chamberlain* v. *St. Paul*, 92 U. S. 299, 306; 2 Pomeroy, Equitable Remedies (2d ed.) § 925.

Wherever equitable principles are called in play, as they preeminently are in determining the rights and liabilities of sureties and in the distribution of insolvents' estates, they likewise forbid the surety to secure by independent contract with the debtor indemnity at the expense of the creditor whose claim he has undertaken to secure.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.